SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 470

ALTHEA G. WILLIAMS, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 28870

ALTHEA G. WILLIAMS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

[fol. 2] COMPLAINT FOR DAMAGES FOR PERSONAL INJURIES—Filed May 23, 1949

Plaintiff complains of defendant and alleges:

I

This action arises under Title IV of Pubic Law 601, 79th Congress, Chapter 753, 2nd session (60 Statutes at Large 843, 28 U.S.C., Sec. 921) as hereinafter more fully appears. Plaintiff at all times herein mentioned was, and is a resident and citizen of the Northern District of California, residing at 1080 Noll Drive or 440 Ravenwood Avenue, Menlo Park, California. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

II

On or about March 3, 1949, at about 10:30 P.M., of said day, at the Apra Harbor Breakwater Turnabout, on the Island of Guam, Marianas Islands, while plaintiff was seated in a motor vehicle, the defendant through its agent Joe R. Seabourn, at that time a member of the armed forces of the United States, with the rating of corporal, and stationed on said Island of Guam, assigned to the Headquarters Base Service Detachment 1, 24th Army Department, [fol. 3] having serial No. 18287747, who was at said time acting in line of duty, negligently drove a motor vehicle owned by defendant commonly known as a weapons carrier against and collided with the automobile in which plaintiff was then and there sitting.

III

As a result plaintiff was injured in her health, strength and activity; was made sick, lame and sore; received a profound shock to her nervous system, organic, functional and internal disorders, fractures of the left first, second, third and fourth lumbar transverse processes, contusion of the head on the right side above the temple, laceration on the outside of the right thigh with bloody discoloration of the skin down to the knee, swelling above the right lateral ankle, injury to the spinal column in the midline corresponding to about the first sacral vertebra, and to the lower end of the sternum; has suffered and will suffer great pain and agony; plaintiff is informed and believes and hence alleges that said injuries so sustained are permanent in their character; all to her damage in the sum of $100,000.00.

IV

By reason and in treatment of said injuries, plaintiff was compelled to and did obtain and will obtain the services of physicians and surgeons and medical treatment, and has [fol. 4] incurred and will incur therefor reasonable and necessary bills in an amount not now known; was compelled to and did obtain X-rays and medical supplies, and has incurred and will incur therefor reasonable and necessary bills in an amount not now known; was prevented from transacting her business or earning her living, and will be unable so to do for a period of months her-after, and at the time of said collision plaintiff was steadily employed and earning in excess of $350.00 a month. Plaintiff prays leave to insert herein the said information not now known when the details are ascertained.

Wherefore plaintiff prays judgment against defendant in the sum of $100,000.00 general damages, the said special damages costs of suit and general relief.

Henry C. Clausen, Attorney for Plaintiff, 315 Montgomery Street, San Francisco, California.

[File endorsement omitted.]

[fol. 5] *Duly sworn to by Althea G. Williams. Jurat omitted in printing.*

[fol. 6] Notice of hearing of motion for summary judgment—Filed November 22, 1949 (omitted in printing).

[fol. 7] IN UNITED STATES DISTRICT COURT

MOTION FOR SUMMARY JUDGMENT—Filed November 22, 1949

The United States of America now moves this Court for a summary judgment on the following grounds:

That the Government's record shows that Corporal Joe R. Seabourn was not at the time of the accident referred to in the complaint, on business pertaining to the United States Government, nor in line of duty nor in the course and scope of employment.

Frank J. Hennessy, United States Attorney, Attorney for Defendant.

Points and Authorities

Long v. United States, 78 Fed. Supp. 35;
Murphy, et al. v. United States, 79 Supp. 925;
Rutherford v. United States, 73 Fed. Supp. 877; (On appeal 168 Fed. (2nd) 70);
Arthur Dee Fabio, et al. vs. United States, Civil Action No. 2112 D. C. for District of Connecticut;
Hubach v. United States, 174 Fed. (2d) 7.

[fol. 8] AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

UNITED STATES OF AMERICA,
State and District of California, ss:

Rudolph J. Scholz, being first duly sworn, deposes and says:

That he is an Assistant United States Attorney for the Northern District of California; that the records on file in this office show that the said Corporal Joe R. Seabourn at the time of the accident referred to in the complaint was not acting in the line of duty nor in the course and scope of employment by the United States of America, reference to which records is hereby made as if fully incorporated herein.

Rudolph J. Scholz.

Subscribed and sworn to before me this 21st day of November, 1949. T. R. Petersen.

[fol. 9] AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT—Filed December 5, 1949

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

Henry C. Clausen, being first duly sworn, deposes and says:

That he is attorney for plaintiff above and makes this affidavit on her behalf in opposition to the motion of defendant for summary judgment.

That, as alleged in paragraph II of plaintiff's complaint she intends to prove at the trial that defendant's agent, Seabourn, was at the time and place of the collision described in the complaint "acting in line of duty".

That regardless of any records in the possession of defendant or the conclusions defendant may draw therefrom the evidence in the possession of plaintiff indicates that at the trial there will be developed a factual situation showing

the liability of the defendant for the negligence of said Seabourn and, among other things, there will be shown as facts that the vehicle driven by said Seabourn was a weapon carrier owned by defendant and that there had been a "trip [fol. 1] ticket" issued, covering said vehicle delivered to said Seabourn, permitting him to drive said defendant's vehicle and covering said driving with an official status thereby as being upon official business for the defendant at the time and place of said collision; and that in accordance with the procedure in effect at the said time and place the said "trip ticket" and the said permission of defendant to Seabourn to drive said vehicle contemplated that the driving at the said time and place was for official business; that accordingly, the defendant clothed the said driving of Seabourn with official sanction and granted him express permission to drive the vehicle and constituted his trip as being upon official business.

Henry C. Clausen.

Duly sworn to by Henry C. Clausen. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 11] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING MOTION FOR SUMMARY JUDGMENT—December 5, 1949

This case came on regularly this day for hearing on the motion for summary judgment. After hearing R. Scholz, Esq., Assistant U. S. Attorney, it is Ordered that said motion be denied.

[fol. 12] IN UNITED STATES DISTRICT COURT

ANSWER—Filed January 23, 1950

Now comes the defendant and answering the complaint, denies and alleges as follows:

I

Denies all the allegations of paragraph II, III and IV.

Wherefore defendant prays that this action be dismissed and that it have its costs incurred herein.

Frank J. Hennessy, United States Attorney, Attorney for Defendant.

[File endorsement omitted.]

[fol. 13] IN UNITED STATES DISTRICT COURT

NOTICE OF TAKING DEPOSITIONS—Filed October 22, 1951

To Henry C. Clausen, Esq., attorney for plaintiff:

Please take notice that the United States of America will take the depositions on written interrogatories of the persons whose names are hereinafter set forth in full:

, Said Depositions will be taken before Lt. Col. Gordon O. Berg, 99 Bombardment Wing (M) APO 334, San Francisco, California, which address is the Post Office address on Guam, or any officer authorized to administer oaths.

The name and address of the persons whose depositions will be taken are as follows:

SGT. Joe R. Seabourn, No. AF19297747, 18th Supply Squadron, APO 334, San Francisco, California.

Corporal Richard C. Schmidt, No. AF13249279, Battery A, 108th Field Artillery Battalion, Camp Atterbury, Indiana.

Sergeant Raymond K. Vincent, No. AF19299472, T.V. 3.4.2. PROV. APO 187, San Francisco, California.

[fol. 14] You are further notified that the direct interrogatories to be propounded to said witnesses are enclosed

herewith and made a part of this notice and that you may propound cross-interrogatories to said witness pursuant to said rules.

Dated: July 18th, 1951.

Chauncey Tramutolo, United States Attorney, By Rudolph Scholtz, Assistant United States Attorney.

Acknowledgment of service (omitted in printing.)

[File endorsement omitted.]

[fol. 15] Deposition of Private (E-1) Richard C. Schmidt, NG13249279, Stationed at Battery A, 108th Field Artillery Battalion, Camp Atterbury, Indiana

Direct interrogatories and the answers thereto.

By the Witness Richard C. Schmidt:

Q. 1. What is your name, rank and organization?

A. Richard C. Schmidt, Private E-1, formerly Corporal, Battery A, 108th Field Artillary Battalion, Camp Atterbury, Indiana.

Q. 2. Were you at any time during the 3rd day of March, 1949, a passenger in the weapons' carrier assigned to 374th TCW, being USAF 2278365-S?

A. Yes, during the evening hours.

Q. 3. Were you with Joe R. Seabourn?

A. Yes, Sir.

Q. 4. Was Seabourn authorized to take the vehicle as far as you know? If so, give the name, rank, station and order of the person issuing the same.

A. I assume that Seabourn was authorized to take the vehicle, but I do not know for sure.

Q. 5. Was said Seabourn on duty the 3rd day of March, 1949.

A. No, Sir.

[fol. 16] Q. 6. What did he do, that you know of, during the entire day of 3 March, 1949?

A. We were together all day. We left camp and we

went out drinking. That's about all we did, drinking and running around. It was about eight o'clock in the morning when we left, and we went to a tavern about a mile from Harmon Field. We stayed there most of the morning. Later that afternoon we went into Agana and other nearby places to drink and came back at night about six thirty or seven o'clock and got dressed and changed. That is when Seabourn got the truck. We left there about eight o'clock and went first to the NCO's Club at the Twentieth Air Force. We stayed there drinking until eight thirty or nine o'clock in the evening. After that we went in the truck to Agana. There, Vincent and myself got off the truck about eleven o'clock and that is the last I know of Seabourn's whereabouts until the next morning.

Q. 7. While said Seabourn was with you, was he intoxicated?

A. Yes, Sir.

Q. 8. Was Seabourn at any time during the 3rd day of March, 1949, performing any official duties?

A. No, Sir.

[fol. 17] Cross-interrogatories and the answers thereto.

By the Witness Richard C. Schmidt:

Q. 1. When and where did you enter the armed services of the United States which was in effect at the time of the collision?

A. The 10th day of September, 1949, Philadelphia, Pa.

Q. 2. What was your assignment and what were your duties on the approximate date of the collision?

A. I was an aircraft electrical accessories repairman. I was in charge of a crew inspecting and overhauling aircraft on the date of the collision.

Q. 3. Under these duties what were you required to do and what did you do in pursuance of these duties?

A. I inspected and repaired electrical appliances and accessories on aircraft.

Q. 4. On the date of the collision is it not a fact that you had a proper pass to leave the base?

A. Yes, Sir, I had a Class A pass to leave the post from the morning of the third until the morning of the fourth at revielle.

Q. 5. Is it not a fact that when Seabourn left the base that day before the collision he went to different places to the barracks at about 7 P. M.?

A. Yes Sir.

Q. 6. State how much beer he drank.

[fol. 18] A. It was quite a lot, maybe thirty or thirty-five bottles of beer.

Q. 7. Is it not a fact that when he got back at that time he got a trip ticket for the said weapons carrier assigned to the 374th T.C.W.?

A. I don't know.

Q. 8. Is it not true that he picked up this trip ticket from Sergeant Stiles of your company?

A. I don't know.

Q. 9. Is it not true that while the trip ticket was made out to Private First Class Carbaro of the 374th Supply Squadron, who worked with Seabourn, that the trip ticket was good for that vehicle until 9:30 A. M., Friday, March 4th?

A. I don't know.

Q. 10. Is it not correct, therefore, that the trip ticket was in effect at the time of the collision?

A. I don't know.

Cross interrogatory No. 11. Is it correct, is it not, that the trip tickets, including the said trip ticket mentioned, in service stock were always passed around between the men working in that section, regardless of the name of the individual to whom the trip ticket was made out?

A. Yes, Sir, that is correct, although I don't know if this vehicle had a trip ticket.

[fol. 19] Q. 12. State whether that was the usual procedure, whether the use of the vahicle was official business or recreation of the individual using it.

A. Yes, Sir, that was the usual procedure. When it was for recreation it was used for that purpose, and when it was for official business it was used for that purpose.

Q. 13. State whether the trip ticket in question while issued therfor for official business was by this usual procedure also for your use of the vehicle for recreation.

A. If there was a trip ticket the vehicle could have been used for official business or for recreation.

Q. 14. State whether the said trip ticket in "service

stock" was similar in effect and purpose to the prior use by yourself and other men in that department.

A. If this vehicle had a trip ticket it was undoubtedly similar in effect and purpose to these used by myself and other men in the department.

Q. 15. State whether you were working in that service stock section in which the trip ticket was issued.

A. No, Sir.

Q. 16. After Seabourn got the trip ticket on the day of the collision, namely, March 3d, 1949, did he get the weapons carrier?

[fol. 20] A. All I know is that he had gotten the weapons carrier and I assumed he had a trip ticket.

Q. 17. Who if anyone went with Seabourn and were passengers?

A. Myself and Corporal Raymond K. Vincent.

Q. 18. Were you driving the car?

A. No Sir.

Q. 19. Where did you go up to the time and place of the collision?

A. We left Harmon Field, went to the 20th Air Force NCO's Club and from there to Agana where we got off. This all took about four hours.

Q. 20. How much beer did you then drink?

A. After we got the vehicle, we rode to the 20th Air Force NCO's Club and drank mixed drinks and champagne. The three of us drank about five bottles of champagne.

Q. 21. What do you remember of the events up to the collision and what is your first recollection thereafter?

A. As I said before, we went to the 20th Airforce NCO's Club and after that to Agana where we left Seabourn in the weapons carrier at which time Seabourn was very drunk. I didn't see Seabourn or the truck until the next day.

Q. 22. Did anyone else drive the weapons carrier from the time the Seabourn got the trip ticket and the weapons car-

[fol. 21] rier up to the time and place of the collision?

A. Up to the time I left him in Agana about eleven o'clock, no one else had driven the weapons carrier while I was with Seabourn.

Q. 23. What happened to the passengers in the weapons carrier with respect to whether they were driving with Seabourn at the time and place of the collision?

A. There was no collision during the time that Vincent and I were with Seabourn in the weapons carrier.

Q. 24. When did you return to your outfit after the collision?

A. As I said before, I was not present when any collision occurred. I returned to my outfit about midnight, having hitchhiked back to Harmon Field from Agana.

Q. 25. Did Seabourn on March 7, 1949, make and sign the attached statement concerning the collision?

A. I don't know. I did not see Seabourn sign any statement.

Q. 26. Was it so signed and made before Albert S. Cole, Special Agent, Guam District CE, and subscribed and sworn to before Woodrow W. Jay, as noted on the statement?

A. I don't know anything about the statement.

Q. 27. Attach hereto any other written statements or reports made by you in connection with the collision.

[fol. 22] A. I made no other written statement or report in connection with this collision.

Q. 28. What disciplinary action, if any, was meted out to you for this collision?

A. None because I had done nothing.

Q. 29. Is it not correct that at the time and place of the collision and as a member there of the Armed Forces that you were technically on duty 24 hours a day?

A. I may be technically on duty 24 hours a day, but at the time I was with Seabourn I was on pass and I was not present at any collision.

Q. 30. Attach hereto all pertinent regulations in respect of your answer to the last question.

A. I don't have any regulations. All I know is that I was on pass.

Q. 31. For how long a period of your knowledge was the procedure noted above, with respect to the mode and method of trip tickets covering army motor vehicles, in effect on the island of Guam?

A. As long as I was over there, and I was over there for about fifteen months, as of March 3, 1949.

Q. 32. Give the names, rank, grade and stations of the various people in the United States Armed Forces, who, to your knowledge, authorized or followed the noted mode and

method of trip tickets and procedure, prior to the date of the collision.

[fol. 23] A. Everyone in my outfit used this procedure. I remember the names of PFC Jack Slinger, Sgt. Raphael Herrera and Lt. John Reese. I can't remember any other names, and I don't know their present location, rank or station, or whether they are in the armed forces anymore.

Q. 33. When Seabourn stated in his statement, "The trip ticket was made out to PFC Carbaro of the 374th Supply Squadron altho he works with us," state what work PFC Carbaro did and with whom.

A. There was a PFC Carbaro who worked in the maintenance supply and issued parts and stock. I don't know who he worked with.

Q. 34. When Seabourn sets forth in his statement, "the trip ticket was good for that vehicle until 9:30 a. m. Friday March 4" state the mode or method of obtaining such a trip ticket, and by whom it was issued.

A. I don't know who issued the trip ticket which Seabourn had if he had one, but the method of obtaining trip tickets was to take the vehicle, which was kept in the squadron area, down to the dispatch office and obtain a trip ticket from the dispatcher who was on duty. There was a dispatcher on duty 24 hours a day.

Q. 35. When Seabourn states in his statement, "The trip tickets in service stock are always passed around between the men working in that section regardless of the name of [fols. 24-25] the individual the trip ticket was made out to" state how long such a procedure had been followed to your knowledge in your section.

A. That procedure was followed in the section I was in as long as I was assigned to the section. I was in the section about a year.

Q. 36. When Seabourn sets forth in his statement "That was the usual procedure whether the use of the vehicle was official business or recreation of the individual using it," state how long that procedure had been followed to your knowledge in your section before the collision.

A. That procedure was also followed during the time I was in the section, and I had been in the section about a year before March 3, 1949.

Q. 37. State the individuals in your section who followed that procedure, including officers and enlisted men.

A. All the men in the Section used the trucks and some of the men that I remember who were in my section were PFC Jack Slinker, Sgt. Raphael Herrera and Lt. John Reese, the same ones I mentioned before.

Richard C. Schmidt, NG 13249279, Private (E-1)
Battery A, 108th FABn.

[fol. 26] (Certificates and return for deposition, omitted in printing).

[fol. 27] DEPOSITION OF JOE R. SEABOURN

ISLAND OF GUAM,
Marianas Islands, ss:

Guam Engineer District,
Eduse Guam,
7 March, 1949.

I, Joe R. Seabourn, Cpl. Headquarters Base Service Detachment 1 24th A. D., being first duly sworn, do make the following voluntary statement. I have been advised of my rights under the 24th Article of War and this statement is given of my own free will without promise of reward, coercion or threats nor has any force been used to induce me to make this statement.

I was born April 10, 1930, and my home ad-ress is Route 2, Somersel, Missouri. I enlisted in the Army with my parents consent. I hold an Army Operator's Permit issued November 22, 1948, 2726 good for army motor vehicles up to 2½ tons. I have had stateside driver's license in Oklahoma in 1946. Once I had my army driver's license suspended here on Guam. It was suspended for speeding in November, 1948 for 30 days just after it was issued. It was suspended by my Company Commander. My father, Dallas Seabourn was a farmer but now he is a carpenter. My regular duties are a Clerk in supply and occasionally in the performance of my duties I drove a Weapons Carrier. On

Thursday, March 3, 1949, I did not work at all that day, I just took off. I stayed over at Harmon Field on the base un- [fol. 28] til about noon time I left the base with some friends, Cpl. Benson and Pvt. Schmidt on my company. I had a proper pass to leave the base. We went to different places between Harmon Field and Agana and drank beer until we came back to the barracks about 7 P. M. I have no idea how much beer I drank but I was just feeling good. Then I got a trip ticket for a Weapons Carrier assigned to 374th T. C. W. I picked up this trip ticket from Sgt. Stiles of my company. The trip ticket was made out to Pfc. Carbaro of the 374th Supply Squadron altho he works with us. The trip ticket was good for that vehicle until 9:30 a. m. Friday, March 4. The trip tickets in service stock are always passed around between the men working in that section regardless of the name of the individual the trip ticket was made out to. That was the usual procedure whether the use of the vehicle was official business or recreation of the individual using it. In my case on March 3, my use of the vehicle was for recreation, altho the trip ticket was issued for official business. After I got the Weapons Carrier Benson Schmidt and I went over to 20th Air Force EM, Club where we drank some more beer. I have no idea how long we stayed there, but we decided to go for a ride. The last I remember of the events of the night of March 3, 1949 was when I let Benson and Schmidt out of the Weapons Carrier in Agana. [fol. 29] I have no idea what time it was that I let them out of the Weapons Carrier. I don't know why they got out of the Weapons Carrier at Agana because I don't remember, but on Friday, March 4, 1949 they told me that I was arguing with them because I was drunk. What happened after Benson and Schmidt left me that night in Agana I haven't the slightest recollection. I don't remember driving the Weapons Carrier down Marine Drive to the Breakwater nor driving it on the breakwater road to the end, and neither do I Remember hitting a parked MK-PK Pickup No. 5704 at the sea end of the breakwater road, and neither do I remember getting out of that Weapons Carrier after the accident and running down the embankment road towards the shore. I don't remember anything until I awoke beside the road, Marine Drive, below Hoover Park, as you go towards Apra Harbor from the breakwater. I was lying be-

side the road when I awakened about 8 or 9 a. m. Friday, March 4. I have no idea how I got there. I do not remember giving the truck to anyone else to drive after I let Benson and Schmidt out of it in Agana. When I awakened by the side of Marine Drive Friday, March 4, about 8 or 9 a. m. I hitch hiked back to camp and washed up. Then I went out [fol. 30] and found Schmidt and Benson and tried to find out what had happened the night before, but since they weren't with me after they left me at Agana, they didn't know. Then I went to Sgt. Seaman's office in service supply to report the Weapons Carrier was lost. However, the fellows in the office told me that when he found the Weapons Carrier and me missing that morning, he, Sgt. Seaman went out looking for me and the Weapons Carrier. He came back with the Weapons Carrier sometime Friday afternoon and told me that I must have been in a wreck on the breakwater road. Then Lt. Werb came in and questioned me about the facts of the accident, but I was unable to tell him anything except that I didn't remember anything after I was in Agana. Lt. Werb restricted me to the area. On Saturday, March 5, I worked until about 9 a. m. when Sgt. Seaman told me to take the rest of the day off and also told me to turn in the trip ticket I had on the Weapons Carrier to the Motor Pool so that a new trip ticket could be issued for the Weapons Carrier. I was not getting this new trip ticket for myself but for the use of the others in the section. Mechanically the Weapons Carrier I was driving Thursday night, March 3, was in perfect condition, the lights brakes and steering system were in perfect operating condition. [fol. 31] I was not injured in the accident involving this Weapons Carrier and MK PK Pickup No. 5704.

I have read this two pages and understood them and there are true to the best of my knowledge.

(S.) Joe R. Seabourn, Cpl.

(S.) Albert S. Cole, Special Agent, Guam District, cg.

Duly sworn to by Woodrow W. Jay. Jurat omitted in printing.

[fol. 32] DEPOSITION OF STAFF SERGEANT RAYMOND K. VINCENT, 3200TH DRONE SQUADRON, FIELD 3, EGLIN AIR FORCE BASE, FLORIDA

Direct Interrogatories:

1. What is your name, rank and station?

A. Raymond K. Vincent, Staff Sergeant, Field 3, Eglin Air Force Base, Florida.

2. Were you at any time during the 3rd day of March, 1949, a passenger in weapons' carrier USAF 2278365-S, or in a vehicle operated by Joe R. Seabourn? If so, explain the circumstances.

A. Yes; I was in a weapons' carrier USAF 2278365-S operated by Joe R. Seabourn. We left Harmon Field about 0800, with Seabourn and hitchhiked to Frank's Place on Marine Drive where we had a few beers. We then went to about two or three other places, where we had a few beers also. Late in the afternoon we hired a cab and drove to a couple of other places and had some more beer. We were both feeling pretty good when we returned to Harmon Field about five or five-thirty; near chow-time. Seabourn got a weapons carrier and about seven o'clock we left Harmon Field. We went to the NCO Club at Twentieth. Seabourn and I went inside and had a few drinks of champagne. [fol. 33] Schmidt waited outside in the carrier. They were playing Bing-O at the time. We left just as Bing-O was ending about an estimated time of between 8:15 and 8:45, maybe later. We then proceeded to drive toward Agana. Seabourn was driving. He was pretty fast. I asked Seabourn to come on back to the Base and he said, "no." I then asked to get out of the vehicle, and Seabourn stopped the vehicle and I got out at the Skating Rink. Schmidt asked Seabourn to take it easy as he (Schmidt) was going home soon and didn't want to get in any trouble. Seabourn didn't slow up, though.

3. To your knowledge, was Seabourn on official duty at all during the 3rd day of March, 1949? If so, what were his duties, if any? If so, under whose command was he?

A. I don't remember; I don't know what his duties were. As far as I know he was under Lieutenant Werb's command.

4. What did Seabourn do during that day as far as you know?

A. As far as I know, actually all I know is that he did a little bit of drinking during the afternoon; I don't recall whether he was on duty or not; he went from place to place; he wasn't drunk during the daytime. That's all I guess I know about what he did during the day.

5. What was his purpose in using that weapon's carrier, as far as you know?

[fol. 34] A. For recreation; he wanted to go to Twentieth Air Force Hearquarters, to the NCO Club there.

6. Was it in connection with any official duties, as far as you know?

A. No; it wasn't any official duties as far as I know.

Cross-interrogatories:

1. When and where did you enter the armed services of the United States which was in effect at the time of the collision?

A. I enlisted in the Air Corps of the Regular Army in December of 1946 at Fort McArthur, California, and was sent overseas to Guam in January of forty-eight where I was still stationed at the time of the collision.

2. What was your assignment and what were your duties on the approximate date of the collision?

A. I was a radar mechanic, MOD 955. My duties on the approximate date of the collision was still radar technician for C 54's. These duties consisted of maintaining APN 9s.

3. Under these duties what were you required to do and what did you do in pursuance of these duties?

A. To keep up the radar equipment on the C 54's; I did keep up maintenance work on C 54's.

[fol. 35] 4. On the date of the collision is it not a fact that you had a proper pass to leave the base?

A. Yes, sir; I had a proper pass to leave the base.

5. Is it not a fact that when Seabourn left the base that day before the collision he went to different places between Harmon Field and Agana, and drank beer until he came back to the barracks at about 7 P. M.?

A. Yes, he did go to several places between Harmon Field and Agana. He drank some beer until he came back to the barracks;however, I believe it was between five and five-thirty, near chow time, when he came back to the barracks.

6. State how much beer he drank.

A. I don't remember, but it wasn't very much though; I couldn't give any definite number of cans.

7. Is it not a fact that when he got back at that time he got a trip ticket for the said weapon carrier assigned to the 374th T.C.W.?

A. Yes, he picked up a trip ticket for the said weapons carrier.

8. Is it not true that he picked up this trip ticket from Sergeant Stiles of your company?

A. I don't remember just who he picked it up from.

9. Is it not true that while the trip ticket was made out to Private First Class Carbaro of the 374th Supply Squadron [fol. 36] who worked with Seabourn, that the trip ticket was good for that vehicle until 9:30 a. m. Friday, March 4th?

A. I don't know nothing about that trip ticket because I never did see it.

10. Is it not correct, therefore, that the trip ticket was in effect at the time of the collision?

A. I don't know but I understood that it was, since Seabourn mentioned that he was going to pick up the trip ticket.

11. It is correct, is it not, that the trip ticket including the said trip ticket mentioned, in service stock were always passed around between the men working in that section, regardless of the name of the individual to whom the trip ticket was made out?

A. I never worked there and I don't know what their policy concerning trip tickets was.

12. State whether that was the usual procedure, whether the use of the vehicle was official business or recreation of the individual using it.

A. I don't remember; I don't know how they had this worked out between them.

13. State whether the trip ticket in question while issued therefor for official business was by this usual procedure for your use of the vehicle for recreation.

[fol. 37] A. I still would have to go along with my answer to the previous question; I don't know.

14. State whether the said trip ticket in "service stock" was similar in effect and purpose to the prior use by yourself and other men in that department.

A. I never worked in service stock; therefore I don't know what the policy was.

15. State whether you were working in that service stock section in which the trip ticket was issued.

A. I never worked in the service stock section at all.

16. After Seabourn got the trip ticket on the day of the collision, namely, March 3, 1949, did he get the weapons carrier?

A. Yes; he picked up the weapons carrier.

17. Who if anyone went with Seabourn and were passengers?

A. Richard C. Schmidt and myself were the only passengers to my knowledge. It has been so long ago that I don't remember whether we picked up any hitchhikers or not.

18. Were you driving the car?

A. No; I never did drive it.

19. Where did you go up to the time and place of the collision?

A. We went to the Twentieth Air Force Headquarters NCO Club. We left there between eight-thirty and nine—[fol. 38] it *it* might have been later—we headed for Agana. I got out at the skating rink in Agana about fifteen minutes after we left the NCO Club. That's all I remember that involved the weapons carrier.

20. How much beer did you then drink?

A. I can't truthfully say right now, but Schmidt or I neither one was drunk. Probably Seabourn was feeling his drinks is all I can say and be truthful about it.

21. What do you remember of the events up to the collision and what is your first recollection thereafter?

A. I wasn't in the collision at all, and I have already described what happened up until the time I got out of the car.

22. Did anyone else drive the weapons carrier from the time Seabourn got the trip ticket and the weapons carrier up to the time and place of the collision?

A. No; not to my knowledge.

23. What happened to the passengers in the weapons carrier with respect to whether they were driving with Seabourn at the time and place of the collision?

A. I wasn't with him at the time of the collision; therefore I don't know whether he had any passengers.

24. When did you return to your outfit after the collision?

A. I wasn't in the collision. I returned after I got out of the car at the skating rink in Agana.

[fol. 39] 25. Did Seabourn on March 7, 1949 make and sign the attached statement concerning the collision?

A. I didn't see Seabourn make, write or sign the attached statement dated 7 March 1949.

26. Was it so signed and made before Albert S. Cole, Special Agent, Guam District, CE and subscribed and sworn to before Woodrow W. Jay, as noted on the statement?

A. I wasn't there. I don't know if or who was there.

27. Attach hereto any other written statements or reports made by you in connection with the collision.

A. The only statement I made is the one I made with Richard C. Schmidt on 14 March 1949. That was the only statement that I signed and a copy is attached hereto.

28. What disciplinary action, if any was meted out to you for this collision?

A. There was no disciplinary action taken against me. I wasn't in that collision.

29. Is it not correct that at the time and place of the collision and as a member there of the Armed Forces that you were technically on duty 24 hours a day?

A. I wasn't at the collision. Yes, I was technically on duty as a member of the Armed Forces twenty-four hours a day.

30. Attach hereto all pertinent regulations in respect of your answer to the last question.

[fol. 40] A. When I was sworn in I was told that I was on call twenty-four hours a day. I don't have any pertinent regulations.

31. For how long a period to your knowledge was the procedure noted above, with respect to the mode and method of trip tickets covering army motor vehicles, in effect on the island of Guam?

A. I don't know what the procedure to the mode and method of trip tickets on Guam was or how long it was in effect.

32. Give the names, rank grade and stations of the various people in the United States Armed Forces, who, to your

knowledge, authorized or followed the noted mode and method of trip tickets and procedure, prior to the date of the collision.

A. I don't know anyone who authorized or followed the mode and method or procedure.

33. When Seabourn stated in his statement, "The trip ticket was made out to Pfc Carbano of the 374th Supply Squadron altho he works with us" state what work Pfc Carbaro did and with whom.

A. I don't recall the name "Pfc Carbano." It's not even familiar with me; I can't even place it; so I can't say what work this man did or with whom.

34. When Seabourn sets forth in his statement, "The [fol. 41] trip ticket was good for that vehicle until 9:30 a. m. Friday March 4" state the mode or method of obtaining such a trip ticket, and by whom it was issued.

A. I never saw the trip ticket at all, and I wasn't present when Seabourn made his statement, and I don't know who or how it was issued.

35. When Seabourn states in his statement, "The trip tickets in service stock are always passed around between the men working in that section regardless of the name of the individual the trip ticket was made out to", state how long such a procedure had been followed to your knowledge in your section.

A. As I previously answered, I don't know the procedure in service stock since I wasn't in that section. I was in Communications Section.

36. When Seabourn sets forth in his statement "That was the usual procedure whether the use of the vehicle was official business or recreation of the individual using it", state how long that procedure had been followed to your knowledge in your section before the collision.

A. I actually can't say as to whether or not we used out vehicles in the Communications Section for recreation. I never used them for recreation.

37. State the individuals in your section who followed that procedure, including officers and enlisted men.

[fol. 42] A. I can't name anybody because I don't know as to whether that procedure was ever followed in our section.

Raymond K. Vincent, Signature of Witness.

[fol. 43] Certificates and Return for Deposition (omitted in printing).

[fol. 44] IN UNITED STATES DISTRICT COURT

ISLAND OF GUAM,
Mariana Islands, ss:

AFFIDAVIT

RICHARD C. SCHMIDT, Private, AF 13249279, Headquarters Base Service, Squadron, Detachment 1, APO 264 and RAYMOND K. VINCENT, Corporal, AF 19288472, Headquarters, Base Service Squadron, Detachment 1, APO 264, both being first duly sworn, do make the following voluntary statements. We have been advised of our rights and understand that we do not have to answer any question the answer to which might incriminate or degrade us, or to answer any question not material to the issue. This statement is given of our own free will without promise of reward coercion or threats, nor has any force been used to induce us to make these statements.

Q. Were you involved in an accident on 3 March 1949 involving 374th TCw Weapons Carrier USAF 2278365-S? Said vehicle was then operated by Cpl Seabourn.

A. No.

Q. Were you at any time during the 3d of March, 1949 a passenger in said Weapons Carrier?

[fol. 45] A. Yes.

Q. Explain the circumstances?

A. We left Harmon Field about 0800, with Seabourn and hitchiked to Frank's Place on Marine Drive where we had a few beers. We then went to about two or three other places, where we had a few beers also. Late in the afternoon we hires a cab and drove to a couple of other places and had some more beer. We were both feeling pretty good when we returned to Harmon Field about five or five-thirty; near chow time. Seabourn got a Weapons Carrier and about seven o'clock we left Harmon Field. We went to NCO Club at Twentieth. Seabourn and Vincent went inside and had a few drinks of champagne. Schmidt waited outside in the

Carrier. They were playing Bing-O at the time. We left just as Bing-O was ending—about as estimated time of between 8:15 and 8:45, maybe later. We then proceeded to drive toward Agana. Seabourn was driving. He was pretty fast. Vincent asked Seabourn to come on back to the base and he said "no". Vincent then asked to get out of the vehicle and Seabourn stopped and Vincent got out at the Skating Rink. Schmidt asked Seabourn to take it easy as he (Schmidt) was going home soon and didn't want to get in any trouble. Seabourn didn't slow up, so Schmidt told Seabourn to let him out (Schmidt), which Vincent did, [fol. 46] at the road junction near the Kit-Kat Cafe on Marine Drive.

Q. Which way did Seabourn drive off in when you got out Schmidt?

A. South toward Hoover Junction.

Q. About what time was it when he left you off at the "rink", Vincent?

A. Roughly about fifteen minutes after we left the NCO Club—about 8:30 and 9:00. It could be later; I doubt if it was sooner.

Q. Do you agree on the time estimates, Schmidt?

A. Yes.

Q. About how many beers or other drinks did Seabourn have that day?

A. I couldn't say.

Q. Was he sober when you were left at the "rink" and the "Kit-Kat"?

A. No. If he was sober, he'd have come back with us.

Q. Was the vehicle in good operating order?

A. Yes.

Q. Do you know if Seabourn appeared to have suffered any injuries that night; that did you observe any the next day?

[fol. 47] A. Vincent: I did not observe any.

Schmidt: He told me he had a bump on his head.

Q. Was he hurt in any way while with you the day and night of the 3d of March?

A. No.

Q. Is there anything else you wish to state in connection with accident?

A. Yes, that Seabourn was definitely drunk when he left

us and probably doesn't know what happened to him that night.

Richard C. Schmidt, Private AF 13249279, Raymond K. Vincent, Corporal AF 19288472.

Duly sworn to by Woodrow W. Jay, jurat omitted in printing.

[fols. 48-49] IN UNITED STATES DISTRICT COURT

NOTICE OF TAKING DEPOSITIONS—Filed March 7, 1951

[Omitted. Printed side page]

[fol. 50] DEPOSITION OF SERGEANT JOE R. SEABOURN NO. AF18287747, 19TH SUPPLY SQUARDON APO 333, SAN FRANCISCO, CALIFORNIA

Sergeant Joe R. Seabourn, now serving in the United States Air Force, stationed at 19th Supply Squadron APO 334, % Postmaster, San Francisco, California, being first by me duly sworn, did depose and say in answer to the attached direct and cross interrogatories as follows:

1. What is your name, rank and station?

A. Joe R. Seabourn, Staff Sergeant, Andersen Air Force Base, APO 334.

2. Were you involved in an accident on 3 March, 1949?

A. Yes, sir.

3. Where and at what time did this accident happen?

A. Some time at night; I don't know, sir. At Apra Harbor Waterbreak.

4. Did you work at all on that day or did you just take time off?

A. I took time off, sir.

5. Where did you stay that morning?

A. Around the barracks at Harmon Field which was my station at that time.

[fol. 51] 6. Where did you go about noon?
A. I went with two of my buddies down to Agana.
7. Who was with you?
A. Private Schmidt and Sergeant Benson.
8. After you left Harmon Field, where did you go?
A. To Agana.
9. Did you have any liquor to drink that afternoon or evening? If so, how much and when.
A. I drank beer in the afternoon; I don't know how much. It was about 1:00 o'clock when I started, sir.
10. Did you get a trip ticket for a weapons carrier assigned to the 374 TCW?
A. Yes, sir; that was after we came back.
11. To whom was this trip ticket made out?
A. Pfc Carbaro.
12. Did you obtain the use of this said weapons carrier?
A. Yes, sir.
13. Was this trip ticket issued for official business?
A. Yes, sir.
14. What did you use it for?
A. I would call it recreation, sir.
15. After you got the weapons carrier, where did you go?
A. I went to Twentieth Air Force. That was the Twentieth Air Force NCO Club.
fol. 52] 16. Did you drink any intoxicating liquor after ou got the weapons' carrier?
A. Yes, sir.
17. Did you go to the 20th Air Force E. M. Club? What ime?
A. No, sir; it was the NCO Club instead of the EM Club. hat was around seven, sir, I guess.
18. Where did you go in the weapons' carrier after you ft there?
A. I went to Agana, and that's the last I remember.
19. If you went for a ride, what was the purpose of it?
A. I couldn't say, sir; I was out for a ride.
20. When and where did you leave Benson and Schmidt t of the weapons' carrier, if you did?
A. In Agana, sir, somewhere. I couldn't say when.
21. Were you intoxicated on the night of March 3, 1949?
A. Yes, sir; I guess I was.

22. Did anyone authorize you to take the weapons' carrier where the accident took place?

A. No, sir.

23. State what happened the night of March 3, 1949.

A. I do not remember, sir. Just the next morning is all I remember.

[fol. 53] 24. Was the United States vehicle you were using the night of March 3, 1949, duly authorized? If so, give the name, rank and station of the person so authorizing it.

A. Well, sir, I couldn't say it was authorized. It had been there and all the guys were using it all the time.

25. Were you of official duty at all on March 3, 1949?

A. No, sir.

26. Were you on official duty at all after 6:00 PM on that day?

A. No, sir.

[fol. 54] Cross-interrogatories of Sergeant Joe R. Seabourn and His Answers:

1. Were you not, at the time of the accident with which we are concerned, namely, March 3, 1949, a member of the armed forces of the United States with the rating of corporal, and stationed on the island of Guam, Service Detachment 1, 24th Army Dept., having Serial No. 18287747?

A. Yes, sir.

2. Did you not on that day at about 10:30 P.M. thereof drive a motor vehicle known as a weapons carrier, and in particular as a 4 x 4 weapons carrier, ¾ ton, U.S.A. No. 2278365-S, assigned to 374th T.C.W., and which weapons carrier was owned by the defendant?

A. No, sir, not that day. I drove it that night.

3. Did you on that day, at about that time while driving said weapons carrier, collide with an automobile in which plaintiff was a passenger?

A. I guess I did, sir.

4. State when and where the collision occurred.

A. I am sorry, I couldn't say when. It was on Apra Harbor is what I was told after it happened.

[fol. 55] 5. Attach a diagram and a map of the location of the vehicles on collision and thereafter, and the site on the island of Guam of the collision.

A. Well, sir, I don't know what happened.

6. When and and where did you enter the armed services of the United States which was in effect at the time of the collision?

A. I enlisted in Jay, Oklahoma, May 21, 1947.

7. What was your assignment and what were your duties on the approximate date of the collision?

A. Well, sir, I still worked in the service stock. I was clearing the field to go home.

8. Under these duties what were you required to do and what did you do in pursuance of these duties?

A. Issue and draw supplies.

9. On the day and at the time of the accident is it not a fact that you then held an army operator's permit issued November 22, 1948, No. 2726, good for any army motor vehicles up to 2½ tons?

A. Well, sir, I don't remember the number, but I guess that's the right number there.

10. Attach a copy of said army operator's permit.

A. I don't have a copy of it.

[fol. 56] 11. Is it not a fact that the army motor vehicle which you were driving at the time and place of the collision was under the limit of the said army operator's permit that the army motor vehicle was a ¾-ton army motor vehicle?

A. Yes, sir.

12. Is it not a fact that at the time you held an Oklahoma state driver's license issued to you in 1946?

A. Yes, sir.

13. Is it not a fact that your army driver's license was suspended on Guam for 30 days in November, 1948, but that thereafter it was in effect and was in effect at the time and place of the collision?

A. Yes, sir.

14. Is it not correct that in performance of your duties as a clerk in Supply on the date of the collision that before said date and at that time you drove a weapons carrier occasionally?

A. Yes, sir.

15. On the date of the collision is it not a fact that you had a proper pass to leave the base?

A. Yes, sir.

[fol. 57] 16. Attach a copy of the pass.

A. I don't have a copy and the squadron I was in transferred to Japan and then they transferred all of our records to the detachment.

17. Is it not a fact that when you left the base that day before the collision you went to different places between Harmon Field and Agano, and drank beer until you came back to the barracks at about 7 P. M.?

A. Yes, sir.

18. State how much beer you drank.

A. I couldn't say, sir.

19. Is it not a fact that when you got back at that time you got a trip ticket for the said weapons carrier assigned to the 374th T. C. W.

A. Yes, sir.

20. Is it not true that you picked up this trip ticket from Sergeant Stiles of your company?

A. Yes, sir.

21. Attach a copy of the trip ticket.

A. Yes, sir. (attached hereto)

22. Is it not true that while the trip ticket was made out to Private First Class Carbaro of the 374th Supply Squadron, who worked with you, that the trip ticket was good for that vehicle until 9.30 A. M. Friday, March 4th?

[fol. 58] A. Yes, sir.

23. Is it not correct, therefore, that the trip ticket was in effect at the time of the collision?

A. I don't know, sir.

24. Is it correct, is it not, that the trip tickets, including the said trip ticket mentioned, in service stock were always passed around between the men working in that section, regardless of the name of the individual to whom the trip ticket was made out?

A. Yes, sir.

25. State whether that was the usual procedure, whether the use of the vehicle was official business or recreation of the individual using it.

A. Well, everybody who drove it used it for the same thing I was using it for. When they weren't using it in service stock they drove it at night.

26. State whether the trip ticket in question while issued therefor for official business was by this usual procedure also for your use of the vehicle for recreation.

A. No, sir. I don't guess it was. I don't know whether they issued trip tickets like that or not. I never did check out one for recreation.

27. State whether the said trip ticket in "service stock" was similar in effect and purpose to the prior use by yourself and other men in that department.

[fol. 59] A. Yes, sir.

28. State whether you were working in that service stock section in which the trip ticket was issued.

A. Yes, sir.

29. After you got the trip ticket on the day of the collision namely, March 3rd, 1949, did you get the weapons carrier?

A. Yes, sir.

30. Who if anyone went with you and were passengers?

A. Sergeant Benson and Private Schmidt were passengers.

31. Were you driving the car?

A. Yes, sir.

32. Where did you go up to the time and place of the collision?

A. We went to Twentieth Air Force NCO Club, then we left there and went to Agana, and that's the last I remember.

33. How much beer did you then drink?

A. I don't know, sir.

34. What do you remember of the events up to the collision and what is your first recollection thereafter?

A. Well, sir, the last I remember, I left Benson and Schmidt out in Agana. Then I woke up the next morning and the sun was shining. That's all.

35. Did anyone else drive the weapons carrier from the [fol. 60] time you got the trip ticket and the weapons carrier up to the time and place of the collision?

A. I do not know, sir.

36. What happened to the passengers in the weapons carrier with respect to whether they were driving with you at the time and place of the collision?

A. No, sir, they wasn't with me.

37. When did you return to your outfit after the collision?

A. Well, sir, it was that morning. I don't know exactly it might have been around 10:00 o'clock.

38. What did you do with the trip ticket that you had on the weapons carrier which was involved in the collision?

A. Well, sir, I gave it to Sergeant Seaman. I believe that was right, whenever he came in.

39. Was this weapons carrier assigned to a motor pool from which you got it after you had obtained the trip ticket on the day of the collision?

A. Yes, sir.

40. Did you get a new trip ticket for yourself after the collision on the weapons carrier?

A. No, sir; I didn't get one.

41. Did you on March 7th, 1949, make and sign the attached statement concerning the collision?

A. Yes, sir.

[fol. 61] 42. Was it so signed and made before Albert S. Cole, Special Agent, Guam District, CE, and subscriber and sworn to before Woodrow W. Jay, as noted on the statement?

A. Yes, sir; I don't remember his name but I remember Cole, but I don't remember the other one's name, sir.

43. Attach hereto any other written statements or reports made by you in connection with the collision.

A. None, sir.

44. What disciplinary action, if any, was meted out to you for this collision?

A. None, sir.

45. Is it not correct that at the time and place of the collision and as a member there of the Armed Forces that you were technically on duty 24 hours a day?

A. Yes, sir.

46. Attach hereto all pertinent regulations in respect of your answer to the last question.

A. I don't know of any, sir.

47. For how long a period to your knowledge was the procedure, noted above, with respect to the mode and method of trip tickets in effect on the Island of Guam?

A. Well, sir, I don't know that. Everything, as far as I know was always the same since I got here.

48. Give the names, rank, grade and stations of the various people in the United States Armed Forces, who, to [fol. 62] your knowledge, authorized or followed the noted mode and method of trip tickets and procedure prior to the date of the collision.

A. Sergeant Seaman, Harmon Field, PFC Carbana, Harmon Field, Staff Sergeant Thomas Thompson; PFC Erp. I don't remember their first names; that's just about all I remember.

49. When you states in your statement "The trip ticket was made out to Pfc Carbaro of the 374th Supply Squardon altho he works with us" state what work he did and with whom.

A. The same job I worked at; issuing and drawing supplies.

50. When you set forth in your statement, "The trip ticket was good for that vehicle until 9:30 a. m. Friday March 4," state the mode or method of obtaining such a trip ticket, and by whom it was issued.

A. Well, sir; I don't remember whether they had let us out on 24 hour dispatch. I don't remember if it was issued. We just went to the motor pool and asked them for the truck if it wasn't out to the section and drove it to the window and they would give you the trip ticket.

51. When you state in your statement "The trip tickets in service stock are always passed around between the men working in that section regardless of the name of the individual the trip ticket was made out to" state how long [fol. 63] such a procedure had been followed to your knowledge in your section.

A. Ever since I started to work in that section. I believed it was the last of August, 1948.

52. When you set forth in your statement "that was the usual procedure, whether the use of the vehicle was official business or recreation of the individual using it", state how long that procedure had been followed to your knowledge in your section before the collision.

A. I believe it started that month. When they started checking it out on 24 hour dispatch they started checking them. Some worked at nights. I don't remember whether they was checking them out on 24 hours dispatch when I came. When I started working in service stock they did that.

53. State the individuals in your section who followed that procedure, including officers and enlisted men.

A. Well, sir, everybody, all the officers had a jeep assigned to them. They drove them and the enlisted men had three

weapons carriers, I believe, to use. There was Lt. Luther, he had a jeep assigned to him, and Lt. Werb, he had a jeep assigned to him. The other two weapons carriers, I don't remember who drove them but I know they drove them at night.''

Joe R. Seabourn.

[fol. 64.] Dated September 4, 1951.

Henry C. Clausen, Attorney for Plaintiff.

Certificate and Return for Deposition

(Omitted in printing)

[fol. 65] EXHIBIT TO DEPOSITION

DRIVERS TRIP TICKET AND P. M. SERVICE RECORD 2272365

Driver's Name
Cabrera — Date 3-3-49

Report to
Lt. Werb — Time out 0810

Organization
DMP — Time in 1500

Department or Address
374th Maintenance

Kind of Work or Route
Official Business

Requested by Orgn. or individual
Lt. Werb — (S.) Nix
Dispatchers signature

Speedometer in 7129; out 7041; total miles 88.
Hour Meter in 0310; out 0810; total hours 24.
Fuel added 10 gals; oil added 0.

I have performed the ''preventive maintenance service of this form and recorded all deficiencies and any accident.

(S.) Cabera
Driver's signature

I have noted all entries on this form and taken necessary action.

TRIP OR LOAD RECORD PASSENGERS OR WEIGHT SPEEDOMETER OR HOUR

From Motor Pool; 7041
To Base Supply;
To Warehouse 1;
To 374 Maintenance;
To Service Stock;
To Hanger 6;
To 376th Supply;
To Hq. Base Squadron;
Vehicle released at 0315-7129;
Official User (signature and grade);
(S.) William R. Werb, Jr. 1st Lt. USAF.

Certified a True Copy Woodrow W. Jay, Civilian Official in lieu, of Claims Officer Guam District, Corps of Engineers Exhibit L Report of Claims Officer U.S.A. No. 2362773, 5 April 49.

[fol. 66] IN UNITED STATES DISTRICT COURT

NOTICE OF TAKING DEPOSITION—October 11, 1951

To: Chauncey Tramutolo, Esq., Attorney for Defendant:

Please take notice that the plaintiff, ALTHEA G. WILLIAMS will take the deposition on written interrogatories of DR. WILLIAM J. FEEHAN, M.D., 860 Brotherhood Building, Kansas City 11, Kansas.

Said deposition will be taken before LEO N. GISH, Notary Public, in care of BERNARD W. ALDEN, ESQ., Attorney at Law, 428 Brotherhood Building, Kansas City 11, Kansas.

You are further notified that the direct interrogatories to be propounded to said witness are attached hereto and made a part of this notice, and that you may propound cross-interrogatories to said witness pursuant to said rules.

Dated: October 11, 1951.

Henry C. Clausen, Attorney for Plaintiff.

[fol. 67] DEPOSITION OF DR. WILLIAM J. FEEHAN, M.D.

Deposition of Dr. William J. Feehan, M.D. a witness of lawful age, taken on behalf of the plaintiff in the above entitled cause, wherein Althea G. Williams is the plaintiff and the United States of America is the defendant, pending in the District Court of the United States for the Northern District of California, Southern Division, pursuant to the notice hereto annexed, before Chas. F. Burkin, Jr., a Notary Public in and for Wyandotte County, State of Kansas, at 428 Brotherhood Building, Kansas City, Kansas, on the 31st day of December, 1951.

Direct interrogatories:

WILLIAM J. FEEHAN, a witness named in the annexed notice, being of lawful age, and being first duly sworn in the above cause, testified on his oath to the direct interrogatories and cross-interrogatories propounded to him and annexed hereto, as follows:

1. Are you a duly and regularly licensed physician and surgeon, and if so, of what state or states?

A. Yes, I am a licensed physician and surgeon in the state of Kansas.

[fol. 68] 2. Of what school or colleges are you a graduate?

A. I am graduate of Creighton University, with a BS in medicine in 1924. Also I graduated from Creighton University College of Medicine with an MD degree in 1926.

3. How long have you practiced your profession, and where?

A. I have practiced my profession for twenty-five years, the last twenty being in Kansas City, Kansas.

4. Do you specialze in any branch of medicine, and if so, what and for how long?

A. I have confined my practice to the orthopedic specialty field since 1929.

5. What position or positions do you hold and have held with respect to your profession?

A. I have been secretary of the Wyandotte County Medical Society and president of the Wyandotte County Medical Society. I am on the staff of St. Margaret's

Hospital, Bethany Hospital and Providence Hospital, all in Kansas City, Kansas.

6. Of what societies are you a member?

A. The Wyandotte County Medical Society, the Kansas Medical Society, the American Medical Association, the International College of Surgeons, and a member of the Kansas State Orthopedic Society.

7. Do you know the plaintiff?

A. Yes.

[fol. 69] 8. Do you recall having examined and treated her in respect of an accident which occurred in March, 1949? If so, when did you examine and treat her?

A. I recall having examined Althea G. Williams, the first time being on November 9, 1949, at my office in Kansas City, Kansas. I saw her after that in April 1950 and treated her at Providence Hospital from April 30, 1950 to July 2, 1950.

9. Had you ever seen her before?

A. No.

10. Where did you see the plaintiff?

A. The first time, November 9, 1949 at my office and subsequently as a patient at Providence Hospital.

11. Did you make an examination?

A. Yes.

12. What did you do in that respect?

A. On the first occasion when I saw her, I took a complete history of her present complaints, her past history, and her chief complaints. I did complete examination and had X-rays made of her entire spine.

13. What did you find?

A. On my first examination, I made the following findings:

1. Laceration of the right temporal region, healed which was tender in the anterior portion and not adherent.

[fol. 69a] 2. She had a muscle spasm in the right cervical spine.

3. There was a muscle spasm in the lumbar area with marked limitation of motion, anterior flexion being limited forty-five degrees and hyperextension nihl.

4. There was a tender scar on the lateral side of the

right thigh with tenderness in the lower one-third of the right leg, lateral side.

5. She was very tender, on pressure, over the lower end of the sternum.

6. There is a vague area of sensory diminition which did not follow dermatome distribution in the right leg.

7. She had a slightly restricted straight leg raising test on the right side.

8. She had a negative LaSegue sign. Ober test and Patrick's test were negative.

The X-ray examination was as follows:

1. The anteroposterior view of the pelvis and lumber spine demonstrated a healed fracture of a transverse process on the left side. There is normal bone density, correct relationship and alinement.

2. The lateral view of the Lumbar Spine demonstrated correct relationship and alinement. There are average interpedicular spaces.

[fol. 70] 3. The anterposterior view of the thoracic spine did not reveal any evidence of fracture, dislocation, bone disease or pathology.

4. The lateral view of the thoracic spine did not reveal any evidence of fracture or dislocation. There is some moderate amount of wedging of the upper thoracic bodies with slight arthritic deposits.

5. X-ray examination of the cervical spine did not reveal any evidence of fracture or dislocation.

14. Was there evidence of pain, and if so to what degree?

A. Yes, there was evidence of pain. The patient had a severe headache, she did not present any objective findings but she appeared to have intense pain at the time of my first examination. There was also definite muscle spasm in her spine, which was aggravated by manipulative procedure and examination. The pain would be extreme on examination.

15. Where was this pain?

A. The pain was in her head and also in the cervical and lumbar spine.

16. What treatment did you prescribe?

A. I prescribed some Salicynol, bed rest and physiotherapy.

17. When did you prescribe such treatment?

A. Following my first examination.

[fol. 71] 18. How many times did you make examinations?

A. On her first visit and again on numerous occasions when she was hospitalized at Providence Hospital. The last time was on November 29, 1951.

19. On what occasions did you make examinations?

A. On her first visit and again on April 30, 1950 and on numerous occasions until July 2, 1950. The most recent examination was on November 29, 1951.

20. On these examinations of what symptoms did the patient complain?

A. Her most persistent complaint was pain in the back, but on numerous occasions she complained of headaches, pain in the anterior chest, a stinging sensation of the right leg and thigh, a shooting pain in the right leg and uncontrollable shaking of the legs. She also complained of excessive menstruation, approximately two times a month.

21. What did you find on these various examinations?

A. At all times she was tender on any gentle pressure over the right temporal region and right forehead. The pain, on pressure, over the sternum has been persistent. Also persistent on each examination has been the muscle spasm in the lumbar spine, and point tenderness over the lumbo sacral joint. She was tender, on pressure, over the lateral side of the right thigh and leg. On each examination, excepting the first, she had a persistent and unilateral [fol. 72] positive Ober test on the right side. She also had limitation of motion in the lumbar spine.

22. In your opinion was this condition you so found the result of the accident she underwent in March, 1949, on Guam?

A. In my opinion, the conditions I found on my numerous examinations are the result of the accident that she described as having happened to her on March 3, 1949.

23. What history did the patient give you in that respect which assisted you in your examination and findings?

A. The history that she gave me was that on March 3, 1949, on Guam, while sitting in a parked car, that this car was hit by another auto, caving in the part of the car against which she was leaning with her back.

24. Did you attribute the results of your findings to the accident?

A. Yes.

25. Did you take any X-rays, and if so, where?

A. Yes, on November 9, 1949, and again on November 29, 1951 x-rays of her spine were made at my office.

26. Did these assist in the examination and findings?

A. Yes, they assisted by ruling out other possible pathology, but not by any confirmative diagnosis.

27. What did the x-rays show?

[fol. 73] A. The anterposterior view of the pelvis and the lumbar spine demonstrated a healed fracture of a transverse process on the left side. There is normal bone density, correct relationship and alinement. The lateral view of the lumbar spine demonstrated correct relationship and alinement. There are average interpedicular spaces. The anteroposterior view of the thoracic spine did not reveal any evidence of fracture, dislocation, bone disease or pathology. The lateral view of the thoracic spine did not reveal any evidence of fracture or dislocation. There is some moderate amount of wedging of the upper thoracic bodies, with slight arthritic deposits. X-ray examination of the cervical spine did not reveal any evidence of fracture or dislocation.

28. What is the outlook for the future?

A. It is my opinion that this patient's condition now is permanent and that she will always have the disability that exists now and that even though future surgery is done, to release the contracted ilio-tibial bands of the right leg, that there will be symptoms which would not be relieved by this operative procedure.

29. Did you render any bills to the patient for your services?

A. Yes.

[fol. 74] 30. What bills, and the dates, did you so render?

A. To date I have rendered only one bill. That was for $247.00 on February 6, 1951. However, since then I have performed additional services so that now the total is $332.00, none of which has been paid.

31. Detail the services involved in connection with the bills so rendered.

A. The bill, to date, is itemized, as follows:

11/ 9/49	Examinations and X-rays	$ 40.00
4/30/50 to 7/2/50—64	hospital visits at Providence Hospital, $3.00 each.	192.00
6/ 7/50	Report to attorneys	5.00
1/20/51	Examination and report	10.00
2/13/51	Testified	50.00
11/29/51	X-rays and examination	35.00
	total to date	$332.00

32. Are the bills so rendered the reasonable value of services rendered by you, as you have outlines?

A. Yes.

33. What in your opinion reasonably should the patient have in the form of future medical services?

A. In my opinion, she should be given the benefit of a fasciotmy, probably bilateral, in an attempt to relieve the contracture of the ilio-tibial bands and, following this, be given thysiotherapy threatments to her back.

[fol. 75] 34. What in your opinion is the reasonable and fair value of the medical services to be rendered in connection therewith?

A. I figure that a fair estimate to cover the additional treatment would be approximately $1,900.00.

35. When did you last see the patient?

A. November 29, 1951.

36. At that time what were her complaints?

A. She had a pain in the back and hips and also some pain in the left arm, a stinging in the right leg and thigh, her heels hurt, a shooting pain in the right leg and thigh, headaches of the right side, frontal and behind the right ear. She also had pain in the anterior chest and still menstruates twice a month.

37. Did you have the benefit of other facts in connection with the history and the complaints, and if so, what?

A. Yes, I understand she had been hospitalized and x-rayed and that the x-rays demonstrated fractured transverse processes of three vertebrae. She stated that she

also had a concussion and upon her return to the United States she was treated by Ernst Gehrels, M.D. of San Francisco, California.

38. What, in your opinion, is the extent of the disability and working ability sustained by the patient as a result of this accident?

[fol. 76] A. It is my opinion that as a result of this accident, her ability to do general work has been materially reduced. It is further my opinion that as a result of the accident that she has lost 35% of her ability to do general work.

39. What in your opinion is the cause of this disability?

A. It is my opinion that this disability is caused by (1) recurring and persistent headaches, (2) sustained pain in the chest, (3) back ache and chronic back strain, (4) uncontrollable trembling and shaking of the muscles of her legs, and (5) functional involvement, and that these causes were, in turn, the result of the accident which occurred and the injuries which she sustained in the accident on March 3, 1949.

40. What in your opinion is the likelihood of permanent disability?

A. It is my opinion that the conditions that exist now are permanent.

41. What future medical treatment is indacted, and please give the reason for your opinion?

A. She has, persistently, on the last examination, had a psitive ober test on the right side, which, theoretically, is the cause of some back ache, because of a slight tortion or twist of the pelvis in the lumbar area of her spine. It is my opinion that she should be hospitalized again for some traction, have a bilateral fasiotomy, and following this, that she should have a rather prolonged course of physiotherapy treatments to the back and right leg. The reason for this fasciotomy would be to relax the ilio tibial [fol. 77] bands which, for some reason or other, is now causing a tortion or strain of the pelvis and back.

[fol. 78] Cross-interrogatories and answers of Dr. W. J. Feehan, M.D.

1. When did you examine the plaintiff?

A. I examined her for the first time on November 9, 1949, on numerous occasions between April 30, 1950 and July 2, 1950 while the was hospitalized in Providence Hospital, and the last time on November 29, 1951.

2. If it is your opinion that her condition was the cause of the accident in March, 1949 on Guam, state specifically upon what you base your opinion.

A. I interpret this question as being whether it is my opinion that her condition was caused by the accident, rather than the way it is worded. It is my opinion that Mrs. Williams' condition was caused by the accident and I base this opinion on the following findings:

a. The objective evidence of disability, such as the scar in the right temporal region.
b. The objective muscle spasm in the cervical spine.
d. The objective muscle spasm in the lumbar spine.
c. The scar on the lateral side of the leg.

[fol. 79] These are all traumatic and there are no additional evidences of disability or illness which would cause the complaints that she has.

3. If your examination is based in part or in whole on X-rays, please attach your X-rays to the deposition.

A. My opinion is not influenced by the X-rays taken. A mere fracture of a transverse process in no way could cause the marked objective findings and subjective complaints, which this patient makes to me.

4. Did you find that her vascular system was normal?

A. Yes. The blood pressure and pulse of this patient have always been within normal limits.

5. Did you find a right lower quadrant scar? If so, what was the cause of this?

A. She has a fine white line in the lower right quadrant, presumably from an appendectomy.

6. Did you find that there was a paravertiebral muscle spasm existing prior to the accident?

A. This patient, on my several examinations, did evidence

a paravertebral muscle spasm, but whether it existed prior to the accident, I do not know.

7. Did you find that her motor and sensory nervous system was intact?

A. Objectively, I would state that there are no signs of motor nervous system involvement, however, there are [fol. 80] subjective complaints and a few objective findings of sensory change and subjective complaints of pain down the left arm. There are also objective findings of sensory alteration in the right leg and thigh, which do not follow any particular dermatome distribution.

8. Did you find that she had a simple fracture of the transverse process of the lumbar two and three left?

A. Yes.

9. Did you find that there was no permanent injury involved?

A. No.

William J. Feehan, M.D.

[fol. 81] Certificate of Notary Public to Deposition (omitted in printing).

[fol. 82] In United States District Court

[Title omitted]

Minute Entry—February 18, 1952

This case came on this day for trial before the Court sitting without a jury. Henry Clausen, Esq., appeared for the plaintiff and Rudolph Scholz, Esq., Assistant U. S. Attorney appeared on behalf of the defendant, Althea Williams was sworn and testified on her own behalf. The plaintiff introduced into evidence certain exhibits which were marked Plaintiff's Exhibits Nos. 1 and 2. The Government introduced into evidence certain exhibits which were marked Defendant's Exhibits A, B, C, D, and E. The hour of adjournment having arrived it is Ordered that the further trial of this case be continued to Tuesday, February 19, 1952 at 10:00 A.M.

[fol. 83] IN UNITED STATES DISTRICT COURT

[Title omitted]

MINUTE ENTRY—February 19, 1952

This case came on this day for further trial. Althea Williams was recalled for further testimony on behalf of the plaintiff. Leo H. Garland was sworn and testified on behalf of the plaintiff. The plaintiff introduced into evidence certain exhibits which were marked Plaintiff's Exhibits Nos. 3, 4, 5, 6, 7, 8, and 9 and 10. Thereupon the plaintiff rested. The defendant introduced into evidence a certain exhibit which was marked Defendant's Exhibit F. The defendant thereupon made a motion for [fol. 84] judgment on the evidence, which motion was denied. It was thereupon Ordered that the further trial of this case be continued to Thursday, February 21, 1952, at 10:00 o'clock.

[fol. 85] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

MINUTE ENTRY—February 21, 1952

The parties hereto being present as heretofore, the further trial of this case was resumed. Althea Williams was recalled for further testimony on her own behalf. The defendant introduced into evidence certain exhibits which were marked Defendant's Exhibits J and K. Defendant's Exhibit I, heretofore marked for identification was filed in evidence. Thereupon both parties rested. After arguments by respective counsel it is Ordered that briefs be filed in 1, 15 and 5 days and that this case be continued to March 21, 1952, for submission.

[fol. 86] IN THE UNITED STATES DISTRICT COURT

MEMORANDUM OPINION—Filed June 4, 1952

Action under the Federal Tort Claims Act for damages for personal injuries. Judgment for defendant, in accordance with opinion.

Henry C. Clausen, San Francisco, California, attorney for the plaintiff.

Chauncey Tramutolo, United States Attorney; Rudolph J. Scholz, Assistant United States Attorney, both of San Francisco, California, attorneys for the defendant.

ROCHE, Chief Judge:

Plaintiff has brought this action under the Federal Tort Claims Act, 28 U. S. C. 921, to recover damages for injuries sustained through the negligence of an intoxicated soldier. The negligence and plaintiff's injuries are not disputed by the defendant. The sole question for decision is whether the soldier was acting within the course and scope of his employment within the purview of the Tort Claims Act. Its determination requires a careful examination of the facts, as disclosed by the record. From the evidence of defendant's witnesses, all of whom testified by deposition, the following facts appear.

The accident occurred on the evening of March 3, 1949, on the island of Guam. Plaintiff was sitting in a vehicle which [fol. 87] was parked at the end of the Breakwater road at the little town of Agana when it was struck by a weapons carrier driven by one Seabourn, a corporal in the United States Army. Seabourn's regular duties were as clerk in supply. He testified that he did not work on the day in question but had taken time off and stayed around his base until about noon, when he left on a pass with CPL Benson and PVT Schmidt of his company. After spending the afternoon drinking beer they returned to the base about seven p. m. and Seabourn picked up a trip ticket for the weapon carrier. (A trip ticket is authorization from a unit Commander to use a particular vehicle on official business.) Accompanied by Benson and Schmidt, he drove to the Enlisted Men's Club, where they indulged in champagne as well as beer and then decided to take a ride. At some time prior

to the accident, Seabourn let both friends out of the vehicle and he testified that that was the last he remembered until the following morning when he awoke beside the road.

A certified copy of the trip ticket was introduced in evidence. It shows that it was made out to one Carbera at the request of Lt. Werb, for official business and was good for 24 hours. It further shows that the vehicle was attached to the 374 Maintenance Unit; that it was dispatched from the [fol. 88] Motor Pool and was scheduled to go various official places. Seabourn testified that he picked up the trip ticket from Sgt. Stiles of his company; that it was common practice for trip tickets to be passed around among the men working in that section, regardless of the name of the person to whom the ticket had been issued; and that this was so whether the vehicle was to be used on official business or for recreation. Schmidt testified that once a vehicle had a trip ticket, it could be used for either official business or recreation. On the other hand Sgt. Stiles stated that the vehicle was to be used for official business only; that because the vehicle was on 24 hours dispatch and was used officially by all men in the section who had permits; that it was good on the post only.

Even assuming that the practice testified to by Seabourn and Schmidt was known and permitted by the officers in charge, it would not make the United States liable. The sovereign cannot be sued without its consent. By the Tort Claims Act the United States has consented to be sued for the negligence of its employees only when they are acting within the scope of their employment which, in the case of military personnel, means acting in the line of duty. To [fol. 89] determine whether the person inflicting the injury was an employee so acting, we look to Federal law and decisions. Local law is looked to only to determine whether the act with which the person is charged gives rise to a tort liability. *United States* vs. *Sharpe,* 189 F. 2d 239/So-called "permissive use" statutes are thus inapplicable and liability cannot be imposed on the United States for negligence of an employee acting outside the scope of his employment, even though the employee's activity has the express or implied permission of the sovereign's agents. *Long* vs. *United States* 78 F. Supp. 35.

Plaintiff argues that Seabourn was acting within the

scope of his employment because he was seeking entertainment; that entertainment is essential to a soldier's morale; and that proper morale is necessary to the maintenance of efficiency in the armed forces. To support her position plaintiff relies on a recent Ninth Circuit case, *Murphy* vs. *United States,* 179 F. 2d 743, in which by a two to one decision, the Court of Appeals reversed a District Court judgment in favor of the United States. This decision, of course, is binding on this court if the facts in the instant case fall within its framework.

[fol. 90] Unfortunately, there is one essential difference which forces the court to conclude that plaintiff's action must fail.

In the Murphy case a soldier negligently drove an army vehicle onto a narrow bridge in the face of an oncoming group of pedestrians, thereby causing one of them to fall to her death. There, as here, the sole question was whether the soldier was acting within the scope of his employment at the time. In holding that he was, the two-judge majority relied on the following facts. Twenty Air Corps soldiers staffed a radar post about three miles from the small town of Klamath, Oregon, which was their only available source of entertainment. Under the authority of the commanding officer pursuant to Army Regulations 700-105 (28) a truck was provided for nightly visits to Klamath for the men's entertainment. The pertinent Regulation provides that Army vehicles may be used by special direction of the Commanding Officer for transporting personnel in connection with authorized, organized and supervised recreational welfare and morale building activities. Once the men reached Klamath the truck was to be parked by a certain building and left there until time for the return trip. On the night in question this was not done. Instead the driver, accompanied by another soldier, used it to drive [fol. 91] to an Indian ceremonial dance being held two or three blocks from the center of town. The accident happened while they were en route. The District Court was reversed on the ground that the driver's recreational use of the truck for himself, after bringing the other soldiers into town was a military employment because it was as important to the United States to maintain the morale of

one soldier as of many and the Indian ceremonial would fall within the class of "authorized—recreational activities" as certainly as would motion picture shows or dances. The court cautioned, however, that it was here concerned only with specifically allowed amusements and that its decision did not mean that "in any case where the soldier is on a frolic of his own he can make the government liable simply because he there found entertainment."

Clearly in the present case Seabourn was on a frolic of his own. His use of the weapons carrier was not for the purpose of transporting personnel, under the special direction of his Commanding Officer, for any purpose authorized by the Regulation, nor was it incidental to such use. On the contrary, he used it as he might his [fol. 92] private automobile in seeking personal entertainment. This was a use contrary to the express purpose of the trip ticket and one not authorized by any of his superior officers. To hold that in so doing he was acting within the scope of his military employment would be an unwarranted extension of the term for which even the liberal construction in the Murphy case would not be authority.

In accordance with the foregoing, therefore, it is by the court

ORDERED that there be entered herein, upon findings of fact and conclusions of law, judgment in favor of the defendant and that the respective parties bear their own costs.

Dated June 4th 1952

Michael J. Roche, Chief United States District Judge.

[File endorsement omitted.]

[fol. 93] IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION AND MOTION TO STRIKE EVIDENCE—Filed July 9, 1952

To: CHAUNCEY TRAMUTOLO, ESQ., Attorney for Defendant, United States of America:

Please take notice that on the 21st day of July 1952, at the hour of 10:00 o'clock A.M. or as soon thereafter as the matter can be heard, the plaintiff, in accordance with order of the court during trial, will move the court above, Judge Michael J. Roche, presiding, Post Office Building, 7th and Mission Streets, San Francisco, California, for an order striking from the record each and such of defendant exhibits "A" to "K", inclusive as were admitted subject to plaintiff's motion to strike and objection.

This motion will be made on the ground that said exhibits are inadmissible hearsay, and will be based on this Notice, and upon the pleadings, papers, records and files in this action.

Dated this 8th day of July, 1952.

Henry C. Clausen, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 94] Memorandum of Points and Authorities

Hubsch vs. U. S., 174 F. (2d) 7, (5th Cir. 1949).
Notice of Service by Mail.

[fol. 95] IN UNITED STATES DISTRICT COURT

ORDER GRANTING MOTION TO STRIKE EVIDENCE—August 28, 1952

The motion of plaintiff to strike evidence came on regularly to be heard on August 25, 1952, Henry C. Clausen, Esq., appearing for plaintiff, and John G. Doll, Esq., appearing for defendant, and the matter having been argued and submitted for decision,

IT IS HEREBY ORDERED that there be stricken from the record such portions of the defendant's exhibits as were heretofore admitted in evidence over plaintiff's objection or motion to strike on the ground of hearsay, and which the trial court consented at the time of trial might be subject to a later motion to strike.

Dated this 28th day of August, 1952.

Michael J. Roche, Judge.

[fol. 96] IN UNITED STATES DISTRICT COURT

PROPOSED AMENDMENTS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed August 16, 1952

Pursuant to Rule 5, (e) plaintiff proposes the following amendments to the proposed findings of fact and conclusions of law submitted by defendant:

I

Page 2, paragraph II, line 11, following the words "weapons carrier", insert "a military vehicle owned by defendant and".

II

Page 2, paragraph III, lines 16 and 17, delete the words "was off duty".

III

Page 2, paragraph III, lines 20 and 21, delete the word "unauthorized" and following the words "weapons-carrier", add the following: "in accordance with the established custom and practice of the military of Guam, by which the military authorized use of its vehicle for recreation and the use of trip tickets designated for official purposes and issued for such purposes. Seabourn at the time and place mentioned obtained authorized use of the military vehicle from the military authorities insofar as the use of its vehicles for recreational purposes was authorized [fol. 97] as being in fact official business."

IV

Page 2, paragraph V, line 32, following the word "accident", insert "whereby on said March 3, 1949, while on duty in Guam and on official pass for recreation, Seabourn negligently drove said military vehicle, provided for recreational use, into the parked automobile in which plaintiff was sitting."

V

Page 3, paragraph VI, strike lines 3 to 8.

VI

Page 3, paragraph I of Conclusions of Law, add thereto: "Guam at the said time and place of the accident was a possession of the United States, and under the control of the military, and as such, the Federal Tort Claims Act was applicable thereto."

Respectfully submitted,

Henry C. Clausen, Attorney for Plaintiff.

(File endorsement omitted).

[fol. 98] In United States District Court

Findings of Fact and Conclusions of Law—filed October 21, 1952

This cause came on regularly to be heard before the above-entitled court, the Honorable Michael J. Roche, presiding without a jury, on the 21st day of February, 1952.

Plaintiff appearing in person and by her counsel, Henry C. Clausen, and the defendant appearing by Chauncey Tramutolo, United States Attorney for the Northern District of California, and Rudolph J. Scholz, Assistant United States Attorney; thereupon oral and documentary evidence was introduced by and on behalf of the parties hereto, and the matter having been argued and submitted and the court being fully advised in the premises, now makes the following

Findings of Fact

I

The plaintiff at all times herein referred to was and is a resident of the Southern Division of Northern District of California.

II

On the evening of March 3, 1949, the plaintiff was sitting in a vehicle which was parked at the end of the Breakwater Road in the town of Agana on the Island of Guam, [fol. 99] when said vehicle was struck by a weapons-carrier driven by Joe R. Seabourn, Corporal in the United States Army, stationed on said Island of Guam and assigned to Headquarters Base Service, Detachment 1, 24th Army Department.

III

On the said 3rd day of March, 1949, Seabourn was off duty. About noon he left the Base on a pass with Corporal Benson and Private Schmidt of his Company. They spent the afternoon drinking beer and returned to the Base about 7 o'clock P.M. Seabourn obtained unauthorized possession of the weapons-carrier.

IV

Accompanied by Benson and Schmidt, Seabourn drove the weapons-carrier to the Enlisted Men's Club, where they indulged in champagne as well as beer, and then decided to take a ride. At some time prior to the accident, Seabourn let both companions out of the vehicle. That was all that Seabourn remembered until the morning following the accident, when he awoke beside the road.

V

The plaintiff suffered bodily injuries as a result of this accident, and this accident was entirely due to the negligence of Seabourn.

VI

Seabourn's use of the weapons-carrier was not for the purpose of transporting United States Army personnel,

[fol. 100] under the direction of his commanding officer, nor for any purpose authorized by Army regulations. Seabourn was on a frolic of his own and used the weapons-carrier as he might use his private automobile in seeking personal entertainment.

From the foregoing recital of the Findings of Fact, the court makes the following

Conclusions of Law

I

The court has jurisdiction of the parties herein and of the subject matter of this action. This action is brought pursuant to the Federal Tort Claims Act, United States Code Title 28, Section 1346 (b).

II

Seabourn, an employee of the defendant, was not acting within the course and scope of his employment.

III

Plaintiff is entitled to recover nothing from the defendant.

IV

The respective parties shall each bear their own costs. Let Judgment be Entered Accordingly.

Dated: this 17th day of July, 1952.

Michael J. Roche, United States District Judge.

(File endorsement omitted).

[fol. 101] In United States District Court

Judgment—filed October 21, 1952

This cause came on regularly to be heard before the above-entitled court on the 21st day of February, 1952, the honorable Michael J. Roche presiding without a jury; the plaintiff was present in court and represented by her attorney, Henry C. Clausen; the defendant, United States of

America was represented by Chauncey Tramutolo, United States Attorney for the Northern District of California, and Rudolph J. Scholz, Assistant United States Attorney; and thereupon oral and documentary evidence was introduced on behalf of each of the parties thereto; the evidence having been concluded, the cause was argued and submitted to the court for decision, and thereafter, the court being fully advised in the premises, made, signed and ordered filed herein the Findings of Fact and Conclusions of Law, which are by reference made a part hereof.

WHEREFORE, by reason of the Law and the evidence and the premises, and the Findings of Fact and Conclusions of Law, as aforesaid,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff take nothing from defendant;

[fol. 102] IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each of the respective parties shall bear their own costs.

Dated this 17th day of July, 1952.

Michael J. Roche, United States District Judge.

[File endorsement omitted.]

[fol. 103] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed November 21, 1952

NOTICE is hereby given that ALTHEA G. WILLIAMS, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on October 22, 1952.

Henry C. Clausen, Richard G. Burns, by Henry C. Clausen, Althea G. Williams

[File endorsement omitted.]

[fols. 104-105] Bond on appeal for $250.00 and filed November 21, 1952 omitted in printing.

[fols. 106-107] In United States District Court

Orders Extending Time to File Transcript of Record on Appeal—filed December 30, 1952 (omitted in printing)

[fols. 108-109] Designation of Contents of Record on Appeal (omitted in printing)

[fol. 110] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 111] In United States District Court

Statement by Appellant of Points to be Relied on and Designation of Record for Printing—Filed February 23, 1953

Appellant above named states that the points on which she intends to rely on the appeal in this action are as follows:

1. The Court erred in failing to conclude as a matter of law that Corporal Joe R. Seabourne was acting within the scope of his employment.
2. The Court erred in finding that Seabourne was off duty on March 3, 1949 and had obtained unauthorized possession of the weapons carrier. (See Finding III).
3. The Court erred in finding that the accident was entirely due to the negligence of Seabourne and in not holding defendant also negligent. (See Finding V).
4. The Court erred in finding that Seabourne's use of the weapons carrier was not for the purpose of transporting United States Army personnel, under the direction of his Commanding officer, nor for any purpose authorized by Army Regulations (See Finding VI).
5. The Court erred in finding that Seabourne was on a frolic of his own and used the weapons carrier as he might use his private automobile in seeking personal entertainment (See Finding VI).

[fol. 112] 6. The Court erred in Conclusion of Law II that Seabourne, an employee of the defendant, was not acting within the course and scope of his employment.

7. The Court erred in Conclusion of Law III that plaintiff is entitled to recover nothing from the defendant.

8. The Court erred in failing to find that Seabourne was driving a military vehicle owned by defendant. (See Paragraph I of Plaintiff's Proposed Amendments to Findings).

9. The Court erred in failing to find that the United States military on Guam, at the time and place of the accident, and in accordance with the established custom and practice of the military on Guam, authorized the use of its vehicles for recreation, and the use of trip tickets designated for official purposes but issued for such recreational purpose; and that Seabourne, at the time and place mentioned, obtained such authorized use of the military vehicle in question from the military authorities, and that insofar as such use of its vehicles was for recreational purposes it was authorized as being in fact official business (See Paragraph III of Plaintiff's Proposed Amendments to Findings.)

10. The Court erred in failing to find that Seabourne was on duty on March 3, 1949 in Guam and was on an [fol. 113] official pass for recreation (See Paragraph IV of Plaintiff's Proposed Amendments to Findings).

11. The Court erred in failing to conclude that Guam, at the time and place of the accident was a possession of the United States and under the control of the military, and as such, the Federal Tort Claims Act was applicable thereto. (See Paragraph VI of Plaintiff's Proposed Amendments to Findings.)

Appellant hereby designates for printing the entire certified transcript of the record as filed with the Clerk of the Court of Appeals.

Dated: February 20, 1953.

Henry C. Clausen and Richard G. Burns, By Richard G. Burns, Attorneys for Appellant.

Acknowledgment of Service (omitted in printing).

[File endorsement omitted.]

[fols. 114-115] ORDER GRANTING MOTION TO PROSECUTE APPEAL ON TYPEWRITTEN TRANSCRIPT AND BRIEFS—March 27, 1953 (omitted in printing)

[fol. 116] IN UNITED STATES DISTRICT COURT

Reporter's Transcript of Trial—Filed February 12, 1953

February 18, 1952

The Clerk: Williams versus the United States, for trial.
Mr. Scholz: Ready, Your Honor.
Mr. Clausen: Ready, Your Honor.

APPEARANCES

The Court: Will counsel state their respective appearances for the record.
Mr. Clausen: Your Honor, my name is Henry C. Clausen.
Mr. Scholz: Rudolph Scholz appearing for the defendant.

ALTHEA WILLIAMS, the plaintiff herein, called as witness on her own behalf, sworn.
The Clerk: State your full name for the record, please.

A. Althea Williams.

The Court:

Q. Where do you live?
A. Kansas City, Missouri.
Q. Is that your home?
A. Well, temporarily.

The Court: Proceed.

Direct examination.

Mr. Clausen:

Q. Miss Williams, your full name is Althea Williams?
A. Yes, sir.
[fol. 117] Q. You are the lady who filed this suit? You are the plaintiff?
A. Yes, sir.

Q. At the time you did file the suit you were then living right here in the state of California, is that right?

A. Well, right now I am in Menlo Park.

Mr. Scholz: That has been admitted by us.

The Court: Let us clear up this matter. Is there any doubt about the jurisdiction?

Mr. Scholz: No, Your Honor.

The Court: Let the record so show, although you cannot consent to jurisdiction if you wished. But it is well to have that in mind, if there is any question about it, so you can prepare your record accordingly.

Mr. Clausen:

Q. What is your present occupation, Miss Williams?

A. Well, I am a steno for the Government.

Q. You are a stenographer and you work for the United States Government?

A. Yes, sir.

Q. And that is in the City of Kansas City, Missouri?

A. Yes, sir.

Q. What kind of position do you have, Miss Williams?

A. Excuse me.

Q. What kind of position is that you have?

[fol. 118] A. Actually right now I do not do any shorthand. I take care of plans, specifications, and pay estimates for the Engineers.

Q. For the Corps of Engineers, is that correct?

A. Yes, sir.

Q. Miss Williams, we are concerned with a suit that was filed in this Court in May of 1949, and it revolves around an alleged occurrence of March 3rd of that same year. Do you recall the 3rd day of March, 1949?

A. Yes, sir.

Q. At that time, Miss Williams, where were you employed?

A. What?

Q. Where were you employed at that time?

A. Well, I was really employed by two people, first by Morrison-Knudsen, this construction contractor, and then by the Civil Service. I taught school for the 20th Air Force.

Q. In any event, this work that you were doing for the two people that you have mentioned was where?

A. On the Island of Guam.

Q. On the Island of Guam, and you had gone there and been there for how long, Miss Williams?

A. Well, I left, I think, December 6th. There is a day change. It is either the 5th or 6th of December.

Q. Of the preceding December?

A. Yes, sir.

Q. So you had worked then on the Island of Guam from [fol. 119] about December 1948 down to March of 1949, is that correct?

A. That is right.

Q. And the work that you were doing was as a secretary or stenographer, was it?

A. Well, I was listed as a secretary there and then a school teacher at night.

Q. The secretarial work that you did was for the Morrison and Knudsen International Construction Company, is that correct?

A. Well, yes, sir.

Q. That in addition to that you did some teaching at night, is that right?

A. Yes, sir.

Q. And the teaching you did at night was for the United States Air Force?

A. Yes, sir.

Q. On that day, March 3, 1949 at about 10:30 o'clock of that day did you have an accident, Miss Williams?

A. Yes, sir.

Q. Were you riding in an automobile or were you in an automobile that was stationary?

A. No, it was just sitting still.

Q. Speak up real loud, Miss Williams.

A. It was just sitting still.

Q. In other words, the automobile that you were in was at rest, is that right?

[fol. 120] A. Yes, sir.

Q. Where was that automobile with reference to the Island of Guam?

A. Well, it was on the Crystal Breakwater.

Q. On the Crystal Breakwater?

A. Yes, sir.

Q. Is that also known as the Apra Breakwater Turnabout?

A. I believe so.

Q. And this was on the Island of Guam, is that correct?

A. Yes, sir.

Q. While you were seated in this motor vehicle was there anyone else in the motor vehicle with you?

A. Mr. Muzzy.

Q. A Mr. Muzzy?

A. Yes, sir.

Q. Do you know his full name?

A. Well, he was my boss. His name is Alexander Carlisle.

Q. He was your boss?

A. Yes, sir.

Q. Insofar as what branch of your work was concerned?

A. I was secretary to him for Morrison and Knudsen.

Q. He worked for the Morrison-Knudsen Company that you also worked for, is that right?

A. Yes.

Q. And his name was A. C. Muzzy?

[fol. 121] A. Yes, sir.

Q. That is M-u-z-z-y?

A. Right.

Q. Had you met Mr. Muzzy at some particular time during that time for the purpose of having a ride in the vehicle in which you were seated?

A. Well, he promised to pick me up after school and give me a ride home, and it was right after school. Would you ask that again?

Q. The question I asked you was just exactly what you answered. In other words, you had been to the school for some purpose that night?

A. Yes.

Q. What work had you done there that night?

A. Well, it wasn't a regular teaching night. That night I gave tests for diplomas.

Q. Tests for diplomas?

A. Yes.

Q. And Mr. Muzzy called for you and was to drive you home, is that right?

A. That is right.

Q. Was there some errand of his own that he was also going to go on?

A. Originally he was going to go on it before he picked me up. He didn't get to it. After he picked me up he had to do it.

[fol. 122] Q. What was it in brief?

A. Our business manager was going to leave and they were going to give him a party at the Builders Club. Mr. Muzzy was supposed to make arrangements at the Builders Club.

Q. Was his trip there in progress at the time you parked at this Crystal Breakwater?

Mr. Scholz: That calls for a conclusion, doesn't it?

Mr. Clausen: I will reframe the question.

Q. Was he en route there at the time you parked at the Crystal Breakwater?

A. Generally, yes, sir.

Q. What was the purpose of parking at the Crystal Breakwater?

A. I didn't date very much, and he wanted me to see the Apra Harbor at night, and there was a Japanese ship we were going to look at, and he said "Do you want to?" and it was really very simple.

Q. In any event, this Japenese ship was in the harbor, was it?

A. Yes, it was.

Q. As you were parked there, Miss Williams, how long were you parked there before the accident happened?

A. Well, I got out of school before ten, I got through early and the kids gave me a party at the PX. We had malted milk and hot dogs. Mr. Muzzy was supposed to pick me up at ten. It was probably, I would say, fifteen or [fol. 123] twenty minutes after ten.

Q. You were there some few minutes, then?

A. Very few.

Q. You were seated where in this vehicle, Miss Williams?

A. Well, I was on the right with my back right kitty-cornered.

Q. With reference to the steering wheel, where was Mr. Muzzy seated?

A. He was under the steering wheel.

Q. He was behind the steering wheel?

A. Yes, sir.

Q. Were there any other people in this vehicle?

A. No, sir.

Q. What kind of vehicle was it that you were in?

A. It was an army pickup.

Q. An army pickup?

A. Yes, sir.

Q. Is that your term for a sort of army truck?

A. Well, they are painted a certain color, and I think they have "Corps of Engineers" written on them.

Q. In any event, this was a truck with an inclosed driver's compartment, was it?

A. Yes, sir.

Q. As you were seated there, did you at any time see the [fol. 124] vehicle that struck you, Miss Williams?

A. Well, I saw it coming and I saw it after it hit us.

Q. When you say you saw it coming, at the time you saw it coming was the vehicle in which you were sitting still stationary?

A. We were stationary until they hit us.

Q. Was the motor in your car off?

A. Yes, sir.

Q. About how far away was the other vehicle when you first saw it?

A. Well, I couldn't answer that very well. I just saw the lights coming and they just kept coming.

Q. You saw the lights coming, and about what time elapsed from the time that you saw the light of the other vehicle coming until the collision?

A. Well, I said "Mr. Muzzy, he is going to hit us." He said, "He can't." And then he did.

Q. In just about that long.

Q. By the way, did you drive a car yourself?

A. Then I did, yes.

Q. Were you able to form any estimate, Miss Williams, before the collision of how fast this other vehicle was going?

A. Well, he was going well over 50 miles an hour. He didn't stop until he hit us. So he probably was going that when he hit us.

[fol. 125] Q. Was your vehicle parked at the place where vehicles customarily park there at the breakwater?

A. Yes, sir.

Q. Could you explain somewhat the road on which the other vehicle was coming? Is that a road that leads down to this breakwater?

A. Do you want me to describe it?

Q. Yes.

A. Well, the Apra Harbor comes out in a sort of half moon. It is one breakwater. It is curved, and right at the end they have a big circle. There are just two places on the island you are supposed to park for viewing things. That is one. They have it fixed so you can park and see the view. It comes out in a sort of arm with a big circle at the end.

Mr. Clausen: Your Honor, may I have the witness draw a rough diagram on the board? Will you step down here, Miss Williams? Take your time and draw, if you will, the breakwater, the harbor, and the road down which the other vehicle came. We understand this is very rough, just to give an idea of where the accident took place.

The Witness: I don't know north, east, south and west.

Mr. Clausen:

Q. It doesn't make any difference.

A. It is sort of like that (drawing on the blackboard), and at the end there is this drive out here.

[fol. 126] Q. Speak up loudly, Miss Williams.

A. This is the breakwater and this is the view place, and it is all coral around here. It is built way up. The whole breakwater is just coral. I think it is probable two lanes on top, and I don't know how many cars can park at the end. That is generally the way it is.

Q. Is that long line, is that the road down which the other vehicle came?

A. Yes, I just thought of something.

Q. Where is the harbor?

A. It is off over this way (indicating). Here is the rest of

the island. You can see clear across here, down to the town of Agana.

The Court: The reporter must take down everything you say, so raise your voice.

Mr. Clausen:

Q. Put an X about where you were parked in the vehicle at the time the collision happened.

A. What?

Q. Put an X on the board at about the place where you were when the collision happened.

A. I don't know, but we were facing that way, so it would probably be here. I couldn't tell you very well—we were facing this way, because we were facing this—I am not very good on directions.

[fol. 127] Q. That is all. You may resume your seat, if you will.

What kind of a night was this, Miss Williams, with reference to the weather?

A. You could see clear across the harbor.

Q. Was it clear?

A. Yes, sir.

Q. Had the moon come up?

A. I couldn't see there was a moon. You could see clear across the harbor, so there must have been.

Q. When you say you could see clear across the harbor, can you give me roughly some idea in miles as to what the distance was?

A. Well, the Apra Breakwater, is just——

Q. Just give me an estimate, if you will.

A. I couldn't that way. I really couldn't.

Q. Do you think it is several miles or more or less?

A. I would say several miles across the harbor. It would be at least two or three, I suppose.

Q. With reference to the weather, this being on the island of Guam, how were you dressed, Miss Williams?

A. I had on a cotton dress and I think sandals.

Q. Had it been raining? Was it storming or anything?

A. No.

Q. Was the weather dry?

A. Yes.

[fol. 128] Q. As the collision happened, what part of the other vehicle, the vehicle that was travelling down this road, struck what part of the vehicle in which you were sitting?

A. His two headlights hit right behind the door where part of my pack was.

Q. In other words, if I understand your answer correctly, the approximate front of this vehicle struck the side of the vehicle in which you were sitting at about the place where you were seated, is that right?

A. That is right, yes, sir.

Q. In other words, struck the side of the vehicle in which you were seated, is that right?

A. He hit us practically at a right angle.

Q. At about where the door was?

A. Yes, sir.

Q. Did you after the collision get some pictures of the vehicle that you were sitting in from the army?

A. Yes.

Q. I show you, Miss Williams, eight photographs and I will ask you, are those the pictures that were given you by the army officers after the collision?

A. Yes, sir, they are.

Q. Does that approximately show the vehicle after the collision so far as you were able to recall?

A. I didn't see it afterwards, you know.

[fol. 129] Q. I say, so far as you are able to recall.

A. Yes.

Mr. Scholz: I think she testified she did not see the vehicle after the collision.

Mr. Clausen: I think that is a correct statement.

Q. After you were hit, did you get out of the vehicle?

A. I don't remember actually getting out of the vehicle myself, Mr. Clausen.

Q. In any event, as the moment of impact occurred, what happened so far as you yourself were concerned?

A. Would you say that again?

Q. As the impact happened, what happened to you?

A. Well, he just hit me and I rattled around all over the front seat and I sort of blacked out, and when I came to my back hurt and my head was all to pieces, sort of. The door handle had gone into my right leg. It was bleeding.

Q. Then were you helped out of the vehicle or did you get out by your self?

A. Well, I got out, but not by myself. First they couldn't get the door open on my side, and I don't know if they got me out on his side or my side. It seemed like it was on my side, but they had trouble getting me out.

Q. In any event, as you got out, what was then done with you?

A. They put me in a jeep and took me back to the girl's quarters.

[fol. 130] Q. Did you see the driver of the other vehicle after the accident, the corporal Joe R. Seabourn referred to in the complaint?

A. I saw the driver, yes.

Q. Where was he?

A. Well, he was out of his car, right where the left hand door was, and he sort of wavered a little bit and ran off down the side.

Q. Had you ridden in this vehicle before that is depicted in these pictures that I showed you?

A. Oh, yes.

Q. Do these pictures show the vehicle? Is that the vehicle in which you were seated at the time of the accident?

A. It is either the one or identical to the one.

Mr. Clausen: We will offer these in evidence, if the Court please.

Mr. Scholz: I think they are objectionable, Your Honor, in this sense: I do not see any particular objection to them but I think the witness has testified she did not see the car after the accident, and I do not see how they can be admitted.

Mr. Clausen:

Q. Did you look around at all after you got out to see the vehicle?

A. As a matter of pure fact, I could identify that door as the door I got out of because it was caved in completely, [fol. 131] where the handle was stuck.

Q. Are you able to say that door shown in these pictures was the door of the vehicle after the accident?

A. I would say definitely.

Mr. Clausen: In view of that, Your Honor, we will offer these in evidence as plaintiff's first in order and as one exhibit, eight photographs.

Mr. Scholz: She identified the door and that is about all you can offer. For that limited purpose I suppose you could offer it.

Mr. Clausen:

Q. Were these pictures given you by the army officers after the accident?

A. Yes, sir.

Q. As showing the truck after the accident?

Mr. Scholz: Just a minute. That is purely hearsay; objectionable.

The Court: Pass them up.

The Court:

Q. Who gave you these pictures?

A. The pictures were given to me by the army photographer through Mr. Muzzy.

Q. Do you recall his name?

A. Yes, sir, William Klinkscales.

Q. When did he given them to you?

A. While I was in the hospital.

Q. Shortly after the accident?

[fol. 132] A. Yes, sir.

Q. And while you were still in the hospital?

A. Yes, sir.

Q. Approximately how many days after the accident?

A. I would say somewhere within three weeks after the accident.

The Court: Let the pictures be admitted and marked.

(The pictures referred to were thereupon received, in evidence and marked plaintiff's Exhibit 1.)

Mr. Clausen:

Q. Immediately after the accident, therefore, I believe you said you were taken to the girls' compound or quarters?

A. Yes, sir.

Q. How were you taken there, Miss Williams?

A. Well, I was taken in a jeep with a siren going.

Mr. Scholz: I can't hear you.

The Court: She was taken in a jeep with the siren going, is that what you said?

The Witness: Yes, sir.

Mr. Clausen:

Q. Who was driving the jeep?

A. Well, it was a soldier or sailor, some serviceman.

Q. Did any MPs come immediately after the accident?

A. Yes.

Mr. Scholz: If you want I will stipulate that Private Boltan of the military police on the island of Guam took her from the seat of the accident to her residence in the [fol. 133] women's compound.

Mr. Clausen: Thank you. We have had access to some of the army file. I thought we could facilitate the trial. I will gladly accept the stipulation.

Q. After you got to the women's compound, what did you then do, Miss Williams?

A. I checked in and went to bed.

Q. Then what happened so far as you yourself were concerned?

A. I just felt like I had a knife up and down my back. I couldn't move very well or sleep. I was awake all night. In the morning one of the girls wanted to know what was wrong. I asked her to call Mr. Muzzy and said "Better send Janet over." Janet came over and took me to the hospital.

Q. Took you to the hospital?

A. Yes, sir.

Q. What hospital was that?

A. The army hospital, 22nd General.

Q. On the island of Guam?

A. Yes, sir.

Q. What do you know to have been your injuries at that time?

A. I had three breaks in the—the little butterfly wings on the back, and they said I had torn ligaments from the angel bones down my back——

Mr. Scholz: I object to what was said.

Mr. Clausen: Just what you know.

[fol. 134] Mr. Scholz: I will stipulate, if you want, that the report of the doctor shows, which we are going to offer in evidence anyway, that there was a fracture of the left transverse processes of the lumbar second, third and fourth.

Mr. Clausen:

Q. Did you have any condition affecting you at that time so far as your head was concerned?

A. In the next day or two all this pus started on my right temple and it was about as big as a dime. They all came in and looked at it. It scabbed over and bled, and I guess that is all of my head, except the bruises.

Q. Was there any pain so far as the head was concerned?

A. I had a terrific headache.

Q. Were there any black and blue marks on your body?

A. There were quite a few. My face was real purplish and sort of brownish-yellow, and this arm up here——

Q. Indicating the right arm. Proceed, Miss Williams.

A. On my wrist and on my left breast and my right leg and both knees were real purple.

Q. How about the lower extremities?

A. That is on my right leg. It was cut here (indicating). My knees were both sort of purple, and right above my ankle was real banged up.

Q. In other words, the part of your body that was next to the door, which door was hit, was substantially black and blue as you have indicated?

[fol. 135] A. Yes, sir.

Q. Did you have pain in those areas at any time?

A. I still do.

Q. In any event, at that time did you?

A. Yes, sir.

Q. What was done for you in this hospital, Miss Williams?

A. Well, they took X-rays and they gave me aspirin and they gave me pills, and they took blood tests. They used heat, they used lights, they tried to rub my legs. I had a lot of trouble with my legs.

Q. I believe you said something about the right side of your head. Did you have any cuts on any other part of the right side of your body?

A. Just where the door handle went in.

Q. Where was that?

A. Well, it is on the outside of my leg, between the knee and the thigh.

Q. Between the knee and the thigh of your right leg. What was the condition there, Miss Williams?

A. Well, it was just sort of cut and sort of jaggedy.

Q. What size cut was it?

A. It was a scar. It was so jagged I would say, overall, it is about an inch or an inch and a half.

Q. An inch or an inch and a half long?

A. Yes, sir.

[fol. 136] Q. How wide?

A. It is so jagged you can't really say.

Q. In any event, that is where you say the door handle went in?

A. Yes, sir.

Q. How long were you in the hospital, Miss Williams?

A. I think it was about the 28th or the 29th of April—I mean of March. Excuse me.

The Court:

Q. How many days was that altogether?

A. I was there over three weeks.

Mr. Scholz: I will stipulate she was there 20 days, your Honor. She went in on the evening of the 3rd and came out the morning of the 24th of March.

The Court: Let the record so show.

Mr. Scholz: Is that agreeable?

Mr. Clausen: Yes, thank you, Mr. Scholz.

Q. Then what did you do, Miss Williams?

A. After I got out of the hospital?

Q. Yes.

A. Well, they were going to send me on a litter plane. They decided not to. They took me over to the girls' quarters at the MK for about three days and then put me on a commercial plane.

Q. To your home in California, Miss Williams?

A. To San Francisco, yes.

Q. Let me ask you, Miss Williams, did you have any [fol. 137] nervous complaints? Were you nervous as a result of this accident?

A. Yes, sir.

Q. In what way did that manifest itself so far as you knew?

A. Lots of little ways. I have headaches, not very steady.

Q. Did you have any of those injuries as to which we heard this afternoon before this accident?

A. Oh, no, sir.

Q. What is that answer?

A. No, sir.

Q. At the time of the accident you were earning how much money, Miss Williams, from the Morrison-Knudsen International Construction Company?

A. $68.90 a week. That counted Saturday, and you had to work Saturday.

Q. $68.90 a week?

A. I believe so.

Q. Which included the work——

A. I could figure it up.

Q. Which included the work, in any event, you say you did—it doesn't make any difference how many days, but that was your weekly pay?

A. You were paid $53. a week plus time and a half for Saturday. That is the way it figured. I really think my figures are right, but I would have to figure it exact.

Q. Which, as you figure it, is $68.90 a week for the [fol. 138] contractor?

A. Yes, sir, I think so.

Q. How much did you get from the United States Air Force for the teaching work you were doing during the week?

A. I got $2.00 an hour, and I taught—at the time I was

hit I was teaching just two nights a week, and I taught four hours a night. That is $16.00 a week.

Q. In other works, $16.00 a week *for* the United States Air Force?

A. Yes, sir, at least it would be that.

The Court:

Q. What did you teach?

A. I taught shorthand, typing and Business English.

Mr. Clausen:

Q. When you got back here to California, Miss Williams, did you here seek medical attention?

A. Yes, sir.

Q. Who treated you here?

A. Dr. Gehrels.

Q. Dr. Ernst Gehrels of San Francisco. Were x-rays taken here, Miss Williams?

A. Yes, sir.

Q. Under the supervision of Dr. Gehrels?

A. Yes, sir.

Q. What treatment did Dr. Gehrels prescribe for you, Miss Williams?

A. Well, he told me it would be quite painful for about six months and to stay off my feet, to take it easy, and he [fol. 139] gave some sleeping pills.

Q. About when was that he was giving you that treatment, Miss Williams?

A. April and May.

Q. At that time did you still have pain in connection with any of these injuries?

A. Yes, sir.

Q. Where was that pain?

A. Well, my back mostly and in my leg, my left arm.

Q. As a result of the pain and the condition that you had did you refrain from seeking employment for some period of time?

A. Yes, sir.

Q. When was it that you again resumed employment?

A. February, I believe the 26th or 28th of last year.

Q. February 28th or 28th of 1951?

A. Yes, it would be the last week in February.

Q. Did you during the interim from the time you saw Dr. Gehrels here down to the present time also seek medical attention from another doctor?

A. Yes, sir.

Q. Who was that?

A. Dr. Feehan.

Q. Dr. Feehan. What is his first name?

A. William.

Q. Where was that, Miss Williams?

[fol. 140] A. He is in Kansas City, Kansas.

Q. Did you under his supervision in Kansas City have some hospital treatment for your injuries?

A. Yes, sir.

Q. What hospital was that?

A. Providence.

Q. Providence Hospital, situated where?

A. In Kansas City, Kansas.

Q. Let me ask you in point of time, can you tell me about how long it was you were under the supervision of Dr. Gehrel in San Francisco, here?

A. Well, I saw him until May of 1949 and then I came back, and I have seen him since I think in—just a minute—I saw him in '50 it would be, in the summer or early fall. I don't know exactly when.

Q. Of 1950?

A. Yes.

Q. When did you first see Dr. Feehan?

A. It was either October, November or December of 1949.

Q. When was it you went into Providence Hospital under the supervision of Dr. Feehan?

A. I believe it was April.

Q. Of what year, Miss Williams?

A. It was, I think, May 30, 1950.

Q. Of 1950?

[fol. 141] A. Yes, sir.

Q. At the time that you went into Providence Hospital what were your complaints at that time, Miss Williams?

A. Well, I had trouble with my back and my legs.

Q. So you had trouble with your back and your legs. Will you describe what you call trouble in more detail. What was this trouble?

A. Well, mostly I got cricks in my hips. I can't stand very well, and he thought traction would help it, and that is what he actually put me in at the time.

Q. Did you have traction then in Providence Hospital?

A. Yes, sir.

Q. That was for what period of time, Miss Williams?

A. I got out of the hospital I think July, oh dear. I was there nine or ten weeks.

Q. Nine or ten weeks in the Providence Hospital, Kansas City. What other treatment did Dr. Feehan give you in that hospital?

A. Oh, he gave me lights and rubbing and sleeping pills, and I slept with—I almost always slept with my legs up on pillows.

Q. I beg your pardon?

A. I say I almost always sleep with my legs up on pillows, and he did some sort of watching to see what was happening when I did that. He just watched me to see what the traction was doing.

[fol. 142] Q. What seemed to be the greatest trouble you had then, Miss Williams?

A. Well, my legs trembled sometimes.

Q. I get your pardon? Just compose yourself, Miss Williams. Take it easy.

The Court: It will be necessary to look at me now. There is no necessity for you to engage in crying. We will have to try to find out what the facts are in this case and you just tell them in your own way. You will get along all right. Proceed.

Mr. Clausen:

Q. What seemed to be the biggest trouble at the time you went into the Providence Hospital, Miss Williams?

A. Well, there were several things. For one thing, I got cricks in my back. I'm sorry.

Q. Take it easy and try to compose yourself. We are only trying to get facts now. Let me turn to some other subject. Miss Williams, when did you try to get employment again after you came back from Guam?

A. In February, 1951.

Q. February, 1951, and what company did you go to work for at that time?

A. Skelly oil.

Q. Where were they, Miss Williams?

A. Kansas City, Missouri.

[fol. 143] Q. How long were you with them?

A. Until July, I think, the 13th or the 17th of last year?

Q. What was the reason for leaving there?

A. Well, there were several. In the first place, the work was to hard. You had to — up and down steps.

Q. Did you have difficulty going up and down steps?

A. Yes, sir.

Q. In what way did you have difficulty?

A. Well, it makes my back ache more and it makes my legs more apt to tremble.

Q. At the Skelly Oil Company they had stairs you had to go up and down?

A. Quite a bit, yes, sir.

Q. In what other way was the work difficult, Miss Williams?

A. Well, they had it fixed where you could work from eight to twelve and you break at ten, and you work I think from 12:30 until 1:00, until 4:30 or 5:00—I don't remember when—and you break once in the afternoon, and since the accident I usually have to go to the bathroom more often than that, and I just couldn't sit that long.

Q. After you left the Skelly Oil Company—by the way, did you have any of those difficulties or complaints before the accident?

A. No, sir.

Q. After you left the Skelly Oil Company did you try to [fol. 144] get some lighter type of employment?

A. Yes, sir.

Q. When did you obtain such employment?

A. I think it was about the 17th or 18th of July.

Q. Of 1951?

A. Yes, sir.

Q. From whom did you then get employment?

A. I worked for the Corps of Engineers.

Q. Is that for the organization that you are now employed by?

A. Yes, sir.

Q. Have you held that position then from that time down to the present time?

A. Well, I started on a different task than I have got. The desk I have is easier. It is different work. It is the same organization.

Q. When you went to work for the Corps of Engineers at that time, July 1951—in any event, regardless of the type of work, did you continue to work for them down to the present?

A. Yes, sir.

Q. In what way was the work that you did for the Corps of Engineers easier to do than what you had been doing for the Skelly Oil Company?

A. For one thing, I can break oftener, and for another, I do not have to sit straight so long. I do not have to sit and take dictation so long, and I have very little typing to do.

[fol. 145] Q. When you worked for the Skelly Oil Company, Miss Williams, what did you earn?

A. $185100 a month.

Q. I beg your pardon?

A. $185.00 a month.

Q. When you worked for the corps of Engineers, when you started there, what did you get from them?

A. Originally I got $2650 a year, now I get $2,950. a year.

Q. As of what time did you start getting $2,950 a year.

A. I have no idea. I am sorry, I really don't.

—. *judg* roughly give me in the period of months last past.

Mr. Scholz: She *was* already said she has no idea.

The Witness: It was a blanket raise they gave every civil service employee.

Mr. Clausen:

Q. Can you in some way find out that figure for use by tomorrow morning?

A. Oh, yes.

Q. And the date?

A. I will call the post office.

Q. Can you tell me if you have complaints at the present time, Miss Williams?

A. Yes, sir.

Q. What are they?

A. Well, my back, my legs, my head and my left arm.

Q. In what way now at the present time does your back [fol. 146] bother you?

A. Well, it hurts in different ways and in different places. The top half just aches. Tight in the middle of my back I have what the doctors call my exclusive, a spot like a raw nerve in my spine. And then my hips—I have a big tendency to get cricks in my hips. When I do, then I may walk on whatever side the crick is.

Q. Has Dr. Feehan advised an operation?

A. Oh, he insists upon it.

Q. But you have not had the operation?

A. No, sir.

Mr. Scholz: Just a minute. I object to the doctor's advice. The best evidence is the doctor's testimony.

Mr. Clausen: That is right. I have taken Dr. Feehan's deposition, which I will read in evidence.

Q. Is it a fact also at the present time, Miss Williams, he has had a heart attack?

A. Yes, I think so.

Mr. Clausen: Dr. Gehrels I intended to use, but he just the other day had some emergency surgery and won't be available for a week or so. I might be able to use his report. I will speak to Mr. Scholz later.

Q. In any event, do these conditions at the present time affect your sleeping at night?

A. Very much so.

[fol. 147] —. In what way?

A. I used to go to bed early, but I don't go to sleep early, and I always sleep with my legs up, on either my pillows or my suitcases, and my legs ache a good bit. And then I almost always wake up in the morning real early, and that is when they really hurt.

Q. Then is it correct to say that as of the present time you do not sleep right straight through in the way you did before the accident?

Mr. Scholz: That is leading and suggestive.

Mr. Clausen: it is. I will reframe the question.

Q. As contrasted with before the accident, Miss Williams, what is your present sleeping at night in respect to how long you sleep?

A. I used to hit the bed and sleep anywhere until they practically shook me out, and now I don't sleep very well at all.

Q. How long a period do you sleep now, as compared to before the accident?

A. How long in periods? Well, I am always asleep or try to be by ten. My worst time is the early part of the morning, and then I am almost always awake during that part.

Q. In respect of sitting. is that affected now as compared to before the accident?

A. Yes, sir.

[fol. 148] Q. I am speaking as of right now, Miss Williams, as compared to before the accident.

A. Before the accident, I could set any old which way. Now if my legs tangle it starts hurting. I don't sit up straight I don't put all my weight on my back, as you sit straight up and down. I sort of sag.

Q. Does that affect your enjoyment of the things you used to do before the accident?

A. Very much so.

Q. In what way, for example?

A. You mean just sitting, walking or both?

A. In any way at all. Just tell me.

A. I don't play tennis, I wouldn't dare ride a horse. I can't sing in the choir, I can't march.

Q. Why can't you sing in the choir?

A. I can't march, the way you are supposed to straight

Q. Can you demonstrate—let us take some other form of reaction. After work are there other things you can't do now that you could do before?

A. I just do not do anything that requires sitting still very long, like sitting in a show. I very rarely go to a show any more. I used to work in the Red Cross. That I don't do any more.

Q. Are you able to show the condition of your back as far as standing straight is concerned? Can you show me that?

[fol. 149] A. You mean just stand up?

Q. Yes. You say you can't stand straight. In what way?

A. I have a tendency to curve.

Q. Stand up and show us. Can you demonstrate?

A. I could show you. I don't know if you would see with my coat on. Do you mind if I take it off? I don't know if you can see it, really. I used to take dancing lessons and I stood straight. Now I curve in the back and curve this way. Here is where my trouble is, here, through my hips. If I stand up straight it hurts here (indicating). I know everybody has been kidding me about being hunchback.

Q. Of course, that makes you embarrassed and humiliated at times.

A. Very much so.

Q. How much do you weigh?

A. 93.

Q. How much did you weigh before the accident?

A. 117.

Q. Do you have any weaknesses in either the right or the left arm now as compared to before the accident?

A. Yes, sir, the left one.

Q. Which arm or hand is weaker now than before the accident?

A. Excuse me?

Q. Which arm or hand is weaker now than before the accident?

A. The left one.

[fol. 150] Q. In what way, Miss Williams, is that weaker affecting what you do?

A. I used to be a very fast typist. Now I am a very slow typing and I am not a very accurate typist.

Q. Is that because of weakness in the hand, the arm or what?

A. This arm aches a good deal. It just aches.

Q. You say "this arm". You indicate the left arm. Proceed, Miss Williams.

A. If I play the piano or if I type or try to do anything with this arm, it makes it ache worse. So I don't use it any more than necessary. I mean you sort of shield it if it hurts.

Q. Before the accident I believe you said you taught typing yourself, is that correct?

A. Yes, sir.

Q. Are there certain exercises that in your teaching a typist is supposed to take in order to acquire speed?

A. Yes, sir, there are quite a few.

Mr. Scholz: In her teaching?

Mr. Clausen:

Q. Is that correct?

A. Yes, sir.

Q. Can you show His Honor and Mr. Scholz the difference now insofar as that exercise is concerned with your ability to move the arm, the left arm, as compared with the right?

A. If you will give me your pencil I will. When you teach typing, you teach that they hold their hand like that [fol. 151] as though they have an orange in it. There are two ways of teaching. A lot of people type with their whole arm, and that shakes their whole back. But if you type with your fingers, you are not to apt to get the shoulder and arm aching and they move their fingers better. You go like that (indicating). You are supposed to be very fast. If you are a good typist, you are very fast. With this hand I can't make it like that, you see?

Q. Indicating the left. In connection with your own mode of life, Miss Williams, do you live in and maintain an apartment?

A. No, sir.

Q. Do you have any difficulties doing housework?

A. Very much so.

Q. In what way is that difficulty manifested? How do you find it difficult to keep an apartment now, for example, as compared to before the accident?

A. Well, ironing is very difficult and very painful for me. Standing still and doing anything with my arms is. I couldn't possibly run sweepers any more, moving beds, washing windows and those things are things, well, you can do them, but you go to bed when you get through.

Q. In what kind of place are you living now?

A. Excuse me. I live in a girls' dormitory. It is called the Inter-denominational Home for Girls. It is a girls' residence hall under the Women's Federation of the Council [fol. 152] of Churches in Kansas City.

Q. Did you get some bills for the work that was done for you by Dr. Feehan?

A. Yes, sir.

Q. Also Providence Hospital?

A. Yes, sir.

Q. I will show you these bills, Miss Williams. This one is from Dr. William J. Feehan, February 6, 1951, total $247. It was addressed to me, but I will ask you whether that bill was rendered to you also?

A. Yes, sir, I have got one like it.

Q. Has that been paid?

A. No, sir.

Q. I have a bill here from the Providence Hospital dated May 15, 1950 in the sum of $115.90 for room and care from April 30th to May 13th. I will ask you whether that has been paid.

A. This is not the full bill.

Q. It is not the full bill?

A. No, sir.

Q. Will you get us the full bill here tomorrow morning?

A. Yes, sir.

Q. In any event was that bill presented to you for the care that you got from the Providence Hospital?

A. Yes, sir.

[fol. 153] Q. Has that been paid?

A. No, sir.

Mr. Clausen: We will offer these in the evidence, Your Honor, as the plaintiff's next in order.

Mr. Scholz: I think that is objectionable, if it is offered as part of the damages that she suffered by paying out that amount, because I do not think there is any testimony that that is the reasonable value of the services.

Mr. Clausen: No, but I asked Dr. Feehan in his deposition, and I am almost sure he said the bill was reasonable.

Mr. Scholz: That would be in his deposition.

The Court: In any event, I will allow those bills to go in evidence.

(The bills referred to were thereupon received in evidence and marked Plaintiff's Exhibit 2.)

Mr. Clausen: Miss Williams, I was going to ask you about the island of Guam. I have a map here, Your Honor, and

I think counsel will stipulate. You may cross-examine at this time.

The Court: We will take a recess.

(Recess.)

Cross-examination.

Mr. Scholz:

Q. Miss Williams, I here show you a photograph which purports to show the scene where the accident took place and the position of the pickup truck in which you were [fol. 154] sitting at the time of the accident, and I ask you this question: Does that represent a fair picture of the scene of the accident and the truck at the time of the accident?

A. It was at night. I don't know.

Q. It was ten o'clock at night, as I understand it.

A. The only thing is I was not on the end of the breakwater in the day time.

Q. As far as you recollect, is there anything different in that picture that you would object to as not being correct?

A. On my word of honor, it could be and it couldn't be. I don't object to it, frankly.

Q. You do not see anything in there different that appears in that photograph than it was on the night of the accident?

A. I am sorry. I really don't know that this is the Apra Breakwater.

Q. You did not answer my question. I say do you see anything in that photograph that is different from the time that this accident happened?

A. It is niether different nor right. I just don't know that this is the Apra Breakwater.

Q. Is there anything different in that that you know of?

A. I don't know how I can say it better.

Q. I do not think you are answering my question. I understand you but I do not think that you are answering my question. I show you this picture now. Do you see any- [fol. 155] thing there that is different from that breakwater at approximately ten o'clock on March 3, 1949? Do you see anything in there that is different from that time? You can answer that yes or no and then explain it if you wish.

A. I have no way of knowing. It was just black that night.

Q. Had you ever been out on that breakwater before?

A. Not to the end.

Q. Had you ever been out to the breakwater approximately where you parked that night?

A. No.

Q. Had you ever been out to the breakwater at all?

A. We went out—I think we went to the first, about the first third at one time. Bill, Janet and I took pictures. At that time the end was roped off. They had things falling down.

Q. How far were you from the end?

A. A couple of miles.

Q. You could see clear out to the end; it was a straight road, wasn't it?

A. I don't know if you could see anything.

Q. Wasn't it a straight road?

A. No, it curves.

Q. As far as you can say now, there is nothing that you know that is different in that photograph?

A. I don't know. I just don't know quite how to answer [fol. 156] you. It is neither different nor alike. It is just blackness at night.

Q. Let me show you this. Your car was parked in the position as indicated in that photograph?

A. We were parked at night. I don't know how it would be when you saw it.

Q. Do you know how your car was parked?

A. No, I told you that.

Q. There is a breakwater going out there, with your car parked like this. Here is your turnaround about like that, perpendicular to the side.

A. Perpendicular? Well, as I remember, and I am almost positive, big rocks were in front of us.

Q. I am talking about your car now.

A. I know. I'm mixed up between the way I was sitting when I got hit and after I got hit. When he hit us, he hit from the other side, and when he got through he was on that side, and I am sort of hazy. I know he hit on this side, and I know he came——

Q. Answer my question. You are dodging my question. I don't think you intend to.

A. I don't.

Q. You do not answer my question. Was your car parked as I indicated in this diagram? Didn't you so testify on direct examination?

[fol. 157] A. Well, now, wait a minute. My right side of the car was parked——

Q. I am asking you the question.

A. I am going to answer it but only how I can. Truthfully I am not good on north, east, south and west.

Q. I'm not interested in where the south or east were or whatever the direction was. I'm just talking about your car.

A. The right side of my car faced the long length of the breakwater because he hit that way. That is what I am trying to tell you.

Q. You state the car was parked this way, then?

A. It was parked sort of this way (indicating).

Q. Will you come down and indicate on this diagram how your car was parked.

A. I couldn't really truthfully except as you have done.

Q. Parked?

A. I couldn't very well. I will show you what I mean. I apparently have not made it clear.

Q. On this diagram here, draw the position your car was parked that night.

A. The right side of my car, when he hit us—I know what you are getting at—the right side of my car was from him. His headlight went that way (indicating). I know what you are getting at. You are trying to say why was I looking at the harbor this way from my window when he was this way.

[fol. 158] Q. You are anticipating something. I am only asking you a very simple question, Miss Williams, as to how your car was parked, and I understood you to say on direct testimony your car was parked perpendicular to the side of the breakwater. Is that correct or isn't it?

A. What is perpendicular? Up and down?

Q. This is perpendicular as I drew it here.

A. I am not very good, but I do know he hit my right side. My window was somewhat so; I could sit back this way.

Q. I am not making a very good record here. Will you draw on this diagram—take a piece of chalk and draw an oblong square how your car was parked on there. Can you do that?

A. I have told you as best I can.

Q. Can you upon that draw an oblong square how your car was parked?

A. You mean how my car was?

Q. Here is the breakwater. You recall the beacon light there at the end of the breakwater, don't you?

A. I remember seeing it after we were hit. Now you want to know how I was parked——

Q. I want you to draw a simple diagram, an oblong diagram showing how your car was parked. This is the outside, this is the inner harbor.

A. Here is the way it goes. Here is the harbor, this is the breakwater.

[fol. 159] Q. Will you kindly please do what I ask? That is a simple question. I asked you to draw an oblong square here indicating how your car was parked.

A. That comes out here——

The Court: Wait just a minute now. Indicate this course aind describe to the witness what it is.

Mr. Scholz:

Q. This is the breakwater going down. I understood you drove along here and you parked. About how many feet from the end of the breakwater?

A. I have no idea.

Q. You parked on this road going out to the end of the breakwater? Did you or did you not?

A. Yes.

Q. Where did you park the car?

A. At the outside of the circle.

Q. This is the outside of the circle, isn't it?

A. I think so.

Q. Will you draw a diagram——

Mr. Clausen: Counsel, what is known as the Crystal Turnaround, Where would that be on your diagram?

Mr. Sholz: Here is a map.

Q. I show you herewith, to refresh your memory, a map taken from the investigation file of the army showing the end of the breakwater. Will you indicate on there the position of your car?

[fol. 160] A. Actually that would be rather difficult. They would probably be this way (indicating).

The Court: Just make a square box where your car was standing.

The Witness: That is what I would guess, and when I wound up——

Mr. Scholz:

Q. This indicates the position of your car?

A. I wouldn't swear to it, but I think so.

Q. As a matter of fact, wasn't it parked perpendicular to this here?

A. Like that? No, it couldn't be because I could look out this way and see the harbor.

Mr. Scholz: We will mark this "W-1". That indicates the position of your car. Will you take the witness stand? Have you any objection to offering this in evidence?

Mr. Clausen: Is that from the army investigation file?

Mr. Scholz: Yes.

Mr. Clausen: No objection.

(The map referred to was thereupon received in evidence and marked Defendant's Exhibit A.)

Mr. Scholz: If Your Honor please, it is stipulated that the agreement that Miss Williams had with Morrison & Knudsen may be offered in evidence.

The Court: You are making an offer here of what?

Mr. Scholz: The Continental Oil employment agreement [fol. 161] between Miss Williams and the Knudsen Company while she was in Guam.

The Court: Is there any objection?

Mr. Clausen: No, Your Honor.

(The agreement referred to was thereupon received in evidence and marked Defendant's Exhibit B.)

Mr. Scholz: Also the separation data of the contractor Knudsen and Miss Williams. I offer that in evidence.

Mr. Clausen: No objection, Your Honor.

The Court: It may be admitted and marked.

(The separation data referred to was thereupon received in evidence and marked Defendant's Exhibit C.)

Mr. Scholz:

Q. Your car was parked stationary there in the breakwater, is that correct?

A. Yes, sir.

Q. Then it was struck while it was parked by another automobile?

A. Yes, sir.

Q. After the collision a soldier drove up and took you to the women's compound where you were staying on Guam?

A. Yes, servicemen.

Q. You got out of the automobile yourself, did you not?

A. I think they helped me up to the gate where the guard was and down the steps.

Q. Didn't you walk into the compound yourself?

[fol. 162] A. Yes. Col. Grant was quite amazed the next day.

Q. They asked you if you wanted to go to the hospital and you refused to go to the hospital, stating you believed you would be all right?

A. I don't know. I don't know that I did. I wouldn't swear I did. I don't remember much of the ride and getting into bed.

Q. Would you say that you did not make that statement?

A. I would not say I didn't do anything during that time, really.

Q. Did you walk into the women's compound by yourself.

A. No.

Q. Who helped you?

A. One of the girls who came in right after me.

Q. Did they ask you if you wanted to go to the hospital?

A. I don't remember that anybody did.

Q. Did you go to the hospital that night?

A. No, they were trying to find the fellow who hit me. That seemed to be the first thing.

Q. Did they offer to take you to the hospital?

A. I don't know that anybody even mentioned it.

Q. Approximately what time was that that they left you off at the women's compound?

A. I have no idea at all.

Q. Have you any idea what time the accident happened?

A. As I *way*, it would probably be—the MPs came through, I think, every 15 minutes and I don't think they [fol. 163] had been through at all, and I got out of school about 10, so it was probably about 10:15.

Q. 10:15 they took you to the women's compound, is that right?

A. No, you stated the accident happened. He didn't come around for a long time. I don't know. I would say somewhere within the space of an hour the accident happened and they took me home.

The Court: I think on direct examination you stated it was about 10:20. Do you recall that?

A. No.

The Court: Am I correct in that, counsel?

Mr. Clausen: I think it was about 10:20, yes.

The Witness: I mean the whole thing happened in the space of an hour, and I was back in bed.

Mr. Scholz:

Q. During all that time after you were struck and you remained conscious you knew what you were doing, did you not?

A. No, I blacked out at first.

Q. As a matter of fact, didn't you write down in your shorthand book the number of the other vehicle?

A. I don't know if I did or if Mr. Muzzy did. We did, though. I don't remember much right after we were hit. I just remember the siren getting back.

Q. I will show you your affidavit, Miss Williams.

[fol. 164] Mr. Clausen: Mr. Scholz, is that from the army investigation file?

Mr. Scholz: That is all from the army investigation file.

Q. That is your signature, is it not?

A. Yes.

Q. Was this question asked you? Look at this. It is rather dim here:

"Q. What was the identification or number of the vehicle which struck your vehicle?

"A. I wrote the number in my shorthand book. It was US 2278365S."

Did you make that statement?

A. Mr. Muzzy probably had the number, but I apparently signed it.

Q. You stated you saw the vehicle coming down the road.

A. I saw the light.

Q. The lights of the vehicle?

A. Yes, sir.

Q. It came right straight down the road, is that correct?

A. It came right down my side.

Q. Well, did it come straight down the road?

A. It would have had to. Yes, sir, it did.

Q. It did not swerve to one side or the other?

A. It stayed on the breakwater.

Q. That is not my question. Did the vehicle that struck [fol. 165] you swerve to one side or the other?

A. Well, I just remember the lights. They didn't go up and down or ziggedy-zag. They just got bigger.

Q. I will repeat the question. Did the vehicle swerve to one side or the other?

A. I don't think so.

Q. It came right straight down?

A. It really come on straight down, yes, sir.

Q. And the next morning then you went to the hospital and stayed there until the 25th of March 1949?

A. I couldn't tell you the exact dates. It is about three weeks.

Q. This affidavit of yours was sworn on the 28th day of March 1949. At that time did you complain of any injuries outside of your ribs?

A. They gave me a crutch, a cane, and I was taped up.

Q. Did you complain of any injuries?

A. Yes, sir.

Q. What did you complain of?

A. Well, my chest. I really thought my ribs had been broken, and they had taped up high. And than they taped me clear down through my back. My back was quite bad. My legs were quite bad. They gave me a crutch.

Q. What injury did you complain of at that time?

A. Back, legs, head and chest.

[fol. 166] Q. I will show you your affidavit here:

"Q. Were you injured?

"A. Yes, but I don't know to what extent."

Did you make that statement at that time?

A. I really didn't make it. They typed it up, brought it over, and I signed it.

Q. You signed it?

A. They insisted that I sign it.

Q. Did they use compulsion?

A. I say they insisted several times.

Q. In what way did they insist?

A. They came over to the hospital several times. They came over to my quarters. They called me at quarters the last three or four days I was there. Believe me, they were very definite that I sign it.

Q. They were belligerent?

A. I would say that they were definitely.

Q. Did they say words to this effect: "You have to sign it or else"?

A. They never said "or else". It was just understood I was supposed to sign it.

Q. Did you feel you were coerced in signing this?

A. I refused to the entire time I was in the hospital and for a couple of days after I got out.

Q. This was signed after you got out of the hospital, [fol. 167] wasn't it?

A. That is right.

Q. At that time that they handed this to you did you refuse to sign it at all?

A. I told them I would rather not.

Q. What did they say?

A. They just said it was a matter of record, it had to be on the record.

—. What did you do then?

A. Well, after three or four days I signed it. I mean when people just insist, when you have to, you have to.

Mr. Scholz: I will offer this in evidence as defendant's exhibit next in order.

The Court: It will be admitted and marked.

(The affidavit referred to was thereupon received in evidence and marked Defendant's Exhibit D.)

Mr. Scholz:

Q. When you went to the hospital—that was the 22nd General, was it not?

A. I believe so.

Q. Did you tell them what your chief complaint was?

A. I told several of them. There were several doctors involved.

Q. Did you give as your chief complaint back pain?

A. I rather imagine so.

Q. Pardon?

[fol. 168] A. Yes, sir, I am sure I would, that and probably my head.

Q. I did not ask you about your head. I said did you say your chief complaint was just your back pain.

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. At that time that you were hurt then you weighed 100 pounds, did you not?

A. Pardon?

Q. At the time you were hurt you weighed 100 pounds?

A. I weighed a good 115 or 117. I was very plump.

Q. Did they weigh you at the hospital? I understood you to say and this record shows you weighed 100 pounds.

A. Well, no. They didn't weigh me at the hospital because they put me right on a stretcher and never took me off until I left.

The Court:

Q. They have a record here that they weighed you in the hospital. Do you recall that?

A. I don't think they did. Really I don't. Quite often doctors will say, "How much do you weigh?"

You say, "Around 100", and they put down "100". But I really don't think they weighed me. I have pictures anyway that show the difference.

Mr. Sholz: I offer the report of the 22nd General Hospital in evidence as defendant's exhibit next in order.

[fol. 169] The Court: It may be admitted and marked.

Mr. Clausen: I am not objecting, Your Honor, but I expect counsel will cooperate because there are portions of the same army file that I would like to introduce.

Mr. Scholz: Anything that is evidentiary, that will help the Court, I will certainly stipulate to.

(The report referred to was thereupon received in evidence and marked Defendant's Exhibit E.)

Mr. Scholz:

Q. Showing you this report, Miss Williams, it says here, "Height five feet", is that correct?

A. No, sir.

Q. How tall are you?

A. Between five and a half and five and three quarters.

Q. "Normal weight 100 pounds". Is that correct?

A. Not then, no. It is all right. I can bring pictures that will show you. It doesn't matter.

Q. Miss Williams, your employment was terminated there, was it not, on the 28th of March, 1949, is that correct?

A. I couldn't say the actual date but I do have the paper. It was before the first of April.

The Court:

Q. What was before the first of April?

A. That I was paid off by Morrison-Knudsen.

Q. How did that happen?

A. How did that happen?

Q. Yes.

[fol. 170] A. Well, you see, they sent me back by commercial airline and they paid me through the last day of the hospital.

The Court: All right.

Mr. Scholz:

Q. Your employment was terminated because of the completion of the Guam project, is that correct? Let me show you the plaintiff's exhibit C.

The Court:

Q. Do you know whether or not they completed their work at that time?

A. I would like to say here——

Q. Just a moment. You answer my question, please.

A. No, sir.

Q. Do you know whether or not their work was at an end there?

A. No, it was not completed until the first of July.

The Court: Proceed, counsel. I am just trying to be helpful. That is all I am trying to do.

The Witness: Thank you. That is all right.

Mr. Scholz:

Q. Do you know whether or not you were provided the first available transportation to your point of hire?

A. It seemed like there was some mixup about a plane being delayed. I missed one. I don't know what it was.

Q. Here is a statement, defendant's exhibit C, your separation data, that you were to return on the Trans-ocean Airlines leaving 0800, eight o'clock in the morning on the 29th day of March, 1949, is that correct?

[fol. 171] A. If that is what the thing says——

Q. Pardon?

A. If that is what is says, it probably is.

Q. I am asking you of your own knowledge.

A. I'm not very good at dates. I know I left at eight o'clock, and I am almost as sure it was Tuesday.

Q. And wasn't it Trans-ocean Airlines.

A. Yes, sir, definitely.

Q. That is one of the non-scheduled flyers over in Oakland?

A. Yes, sir. Could I say something here, please?

The Court: What is it?

The Witness: The reason——

The Court: Just a moment.

The Witness: I said could I say something?

The Court: No, I would advise you not to. You have an attorney. You might say something that would militate against you.

The Witness: Yes, sir.

The Court: Were you ever in court at any time before?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. When?

A. I was adopted at 14.

Q. I mean on the trial of the case.

[fol. 172] A. One divorce, yes, sir.

The Court: The thought I have in mind is that your attorney knows how to protect you, and you might say something that would militate against you with reference to the merits of the case. It is always well to have him take care of your matters.

Mr. Scholz:

Q. Mr. Muzzy went with you to the women's compound, is that correct?

A. You mean after?

Q. After the accident.

A. He took me to the guard gate of the women's compound, yes, sir.

Q. Did you tell him you preferred to go to your room?

A. I really don't remember.

Q. Do you recall how wide that breakwater is, the road leading out to it? Strike that, Mr. Reporter.

Do you remember the beacon light at the end of the breakwater?

A. Yes, sir.

The Court: Here is a photograph of it, isn't it? Look at this photograph——

Q. Is that the lighthouse there?

A. I don't remember the lighthouse but I do know there was a light there. I don't remember how it looked.

Q. Is there any question about this being a photograph [fol. 173] of the scene?

A. No.

Mr. Scholz:

Q. Do you recall how wide that road is there?

A. No, sir.

Q. About where the accident took place?

A. No, sir.

Q. As I understand it, you stated you saw this automobile just an instant before it struck you?

A. Yes, sir.

Q. You said, "It looks like it is going fast" and then it struck you?

A. I said, "It's going to hit us." And Mr. Muzzy said, "It can't." And it did.

Q. Just that minute?

A. It didn't take very long.

Q. How long after you said that did it hit you?

A. I don't know. It wasn't very long. It was awfully short.

Q. Short could be one hundred years or it could be a fraction of a second.

A. I would say it was a matter of mere seconds.

Q. Two or three seconds or more?

A. It couldn't have been over two or three. I am not very [fol. 174] good at distance or time.

Q. It had strong, bright lights, did it?

A. They were very bright.

Q. Based upon the time that you saw that light, not more than two or three seconds, you estimate it was going 50 miles an hour?

A. It must have been.

Q. Is that what you base your estimate on?

A. The fact that it came so fast so quick, yes, sir.

Q. After you were struck you stated you stai*d* in the car until you were helped out of the car, did you say?

A. Yes, sir.

Q. You did not talk to the driver of the other vehicle, did you?

A. He ran away; no, sir.

Q. He ran away?
A. Yes.
Q. So you did not actually talk to him at all?
A. No, sir.
Q. I thought you stated on your direct examination that you saw Corp. Seabourn after the accident and talked to him.

Mr. Clausen: No, she didn't say that, counsel.

Mr. Scholz: I have a note here: "Saw Seabourn after the accident."

The Witness: I saw him after he hit us.

[fol. 175] Mr. Scholz: I asked if she saw the driver of the other vehicle. That is what I meant.

The Witness: I saw him after he hit us, before he went away, while he was still running away.

Q. Could you identify the driver of the other vehicle?
A. I hope not. I wouldn't want to see him.
Q. I am sorry. Don't get upset at this. I am trying to get the facts of it. I have to stay with it until I get an answer to it. You do not know who the driver of the other vehicle was, is that a fact?
A. Well, I was not introduced to him. I wouldn't know.
Q. You dodge my questions. Maybe you do not intend to. You do not know who the driver, you could not identify the driver of the other vehicle, could you?
A. Well, if I saw him I might—you mean by his name or by his face?
Q. Any way.

The Court:

Q. Maybe I can help you. When you were struck did you see the man who was driving the car?
A. Yes, sir.
Q. When?
A. When he got out and ran away.
Q. All right. Just be patient while you tell us as near as you can what happened. Did you talk to him at all?
A. No, sir.
[fol. 176] Q. Did he say anything?
A. No, sir.
Q. He got out of his car and ran away immediately, did he?

A. When I came to he was just standing by his door, and I saw him sort of three quarters of his face, and then he ran off down the side of the coral rocks.

Q. Did you ever see him again at any time?

A. Never—I don't think so.

The Court: All right. Let us proceed.

Mr. Scholz:

Q. Calling you- attention to defendant's exhibit B, your services for which you were paid $46—is that $46 a week?

A. I started at $48 at 3. When I got hit I was a 4 and $53.

Q. Did you have any difficulty in walking from the pickup car in which you were riding to the jeep driven by the MP who took you to the women's compound?

A. Very much so.

Q. I beg your pardon?

A. Very much so.

Q. Did you have any difficulty in walking from the jeep of the MP to your house in the women's compound?

A. Mr. Muzzy or someone helped me down the inside place and then this girl helped me up the stairs in the women's compound. I really didn't go alone.

Q. Your leg was not bleeding at all?

[fol. 177] A. It ruined the dress.

Q. I did not say anything about your dress.

A. Yes, it was bleeding.

Q. Where was it bleeding?

A. The dress had blood all over that side.

Q. I am not talking about your dress. Where was your leg bleeding?

A. About half way between the knee and the thigh on the outside.

Q. On what leg?

A. The right.

Q. Your home station was Sausalito, was it not?

A. Yes, sir.

Q. When did you return to Sausalito after the accident? What date?

A. They flew me back and I think it took probably a day or two. It was around the first of April.

The Court: We will now take an adjournment until ten o'clock tomorrow morning.

[fol. 178] February 19, 1952 at 10:00 o'clock.

ALTHEA WILLIAMS, previously sworn, resumed the stand,

Cross-examination (Continued):

Mr. Scholz:

Q. Miss Williams, I herewith show you what purports to be a copy of the approval order directed to you, among others—I have already shown it to your counsel—authorizing, just briefly, that you are to depart from the island of Guam on or about the 29th day of March 1949 on the basis of the completed contract due to reduction of force. Did you receive a copy of this order?

A. I believe so. I am sure so.

Mr. Scholz: I offer this in evidence as defendant's exhibit next in order.

The Court: It may be admitted.

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit F.)

Mr. Scholz:

Q. Did you see the pickup in which you were seated at the time of the accident after the night of the accident?

A. No, sir.

Q. Pardon?

A. No, sir.

[fol. 179] Q. You said it was dark at the time of the accident. Did you so testify?

A. It was night time, yes, sir.

Q. How could you identify the door of your vehicle in plaintiff's exhibit No. 1? How did you identify the door and not the rest of the vehicle?

A. When the MP or whoever it was drove up, he shone his lights on it and drove right to us, as the fellow who hit us, but he stopped. His lights were on us when I got out.

Q. When the MPs drove up were you seated inside or outside?

A. I was inside.

Q. From the inside how could you see the outside of the door?

A. I didn't. I couldn't have seen the outside from the inside.

Q. Then how could you identify the outside of the door when you were sitting inside?

A. Because they made such a commotion about "look how it is all caved in". They had an awful time getting it opened to get me out, and I remember seeing the door when I got out. They sort of half carried me out, and they were talking about getting me out, and it would have blown up if it had hit somewhere else.

Q. Then you did see the door after you got out?

A. After I got out but not after the accident—after the [fol. 180] night of the accident, I mean. Do you know what I mean?

Q. Right after the accident you saw the door?

A. Yes, we were right in his headlights.

Q. Assuming this oblong square is the pickup truck that you were riding, the rear part is open, is it not?

A. Yes, sir.

Q. And this is an inclosed cab?

A. Yes, sir.

Q. The vehicle struck the right side of the parked car?

A. Yes, sir.

Q. And the driver was sitting on the left side of the parked car?

A. Yes, sir.

Q. And you were sitting on the right side?

A. Yes, sir.

Q. How did you know I was going to ask you how you could see the approaching lights of the vehicle in the position you sat in like you testified here yesterday?

A. The first one or the second one?

Q. Pardon me?

A. The first one or the second one?

Q. I can't hear you?

A. The first car that hit me or the MP car?

Mr. Scholz: Will you read the question?

[fol. 181] (Question read.)

A. You see, I was sitting with this leg up under me and this leg down, and my back was in the corner. You know how you are when you are talking to somebody. The doctor said if I hadn't had my leg up by back in the catercorner position, I would have broken it this way instead of this way (indicating). But when you see lights, I just looked this way right through the window.

Q. Will you answer my question?

(Question read.)

A. I just saw them. I mean when you see lights at night you look at them.

Q. And that is why you thought I was going to ask you that question?

A. I am confused, I am sorry. I am really confused.

Q. The other vehicle was not damaged, was it, the vehicle that struck the vehicle you were riding in?

A. All I saw was the man get out of the car. I don't know that it was damaged. I really couldn't say that it was not.

Q. Mr. Muzzy was employed by the Morrison-Knudsen Company, was he not?

A. Yes, sir.

Q. He was not injured, was he?

A. Well, he hurt his shoulder. Put it that way.

Q. He did not receive any medical treatment.

A. Not from the army, no.

[fol. 182] Q. Or anyone else?

A. I think he went to the MP nurse. I think she looked at him.

Q. You were working for Morrison-Knudsen on the 3rd of March 1949? That is the day of the accident.

A. Yes, sir.

Q. What time did you finish your work with Morrison-Knudsen?

A. Well, we either worked to 4:00, 4:15 or 4:30.

The Court:

Q. What time, if you recall, that day did you get through with your work?

A. Between 4:00 and 4:30, regular duty hours.

Mr. Scholz:

Q. When you got finished with your work did you go — the women's compound?

A. Yes, sir.

Q. Did Mr. Muzzy pick you up there that evening?

A. Oh dear, I don't remember if he took me to school that night or not. It seems I had a ride down with the woman I always rode with, and he picked me up. I was coming home early.

Q. Did you work for the United States Air Force on Guam, too?

A. Yes, sir.

Q. Did you receive any compensation for that, I mean for any injuries suffered under the Federal Employees' Compensation Act.

A. No, sir.

[fol. 183] Q. Under your contract you were covered also by workmen's compensation, were you not?

Mr. Clausen: We will object to that as calling for a conclusion of law. If Mr. Scholz wants the fact, I would say to him that they have denied liability on the ground that it was after hours. She got no compensation from anyone.

Mr. Scholz: That is what I wanted to find out.

Mr. Clausen: No.

Mr. Scholz: The contract as stipulated calls for compensation.

Mr. Clausen: While working.

Mr. Scholz: If you say she did not receive any, I will accept your statement.

Mr. Clausen: That is right, she did not receive any.

Mr. Scholz:

Q. Did Morrison-Knudsen pay your hospital bill at Guam, the 22nd General Hospital, if you know?

A. Well, I am sure they must have.

Q. You did not pay it?

A. No, sir.

Q. And you received from Morrison-Knudsen what pay you were entitled to up to the time of the termination of your employment at Sausalito?

A. Yes, sir.

Q. Referring to the physical examination at the 22nd General Hospital in Guam, they gave you a complete [fol. 184] examination, did they not?

A. I think so, yes, sir.

Q. You testified yesterday that you were bleeding from a cut.

A. Yes, sir.

Q. Was that on the left or the right leg?

A. Right.

Q. The right leg?

A. Yes, sir.

Q. You did not testify to the left leg yesterday?

A. I might have gotten confused but I don't think so.

Q. How large a cut was that?

A. Well, we measured it last night and it is between an inch and three quarters and two inches, but it is real jaggedy.

Q. Calling your attention to defendant's exhibit B, section 11 states, "Before departure from the point of hire and from the point of embarkation employees shall submit to such physical examination, vaccination, etc., as may be required by the contractor." Did you receive any physical examination or was any required by the contractor before your departure?

A. From here to Guam?

Q. From Guam. You departed from Guam.

A. The contractor gave me crutches and a cane to try out, and tried to get me to use it. The MK doctor, when I was in quarters, they gave me sleeping pills. The army—yes, sir, the answer is.

[fol. 185] Q. Did he give you any copy of a report he made?

A. No, sir.

Q. Did he permit you to return to Sausalito?

A. He retaped me and told me I had better get to a surgeon.

Q. What treatment was given you at the 22nd General Hospital?

A. Well, they kept me in bed. They gave me sleeping pills and they gave me dope.

Q. And they taped your ribs, did they not?

A. They taped me two different times. Once they taped me up above for the chest that was troubling, and before I left they took these little boards and taped me with the boards, and they wheeled me in a wheelchair after a while over to the physiotherapy and gave me light and heat treatments.

Q. Did they do anything else?

A. I don't remember now that they did. They might have.

Q. You arrived in Sausalito on or about April 1st, is that correct?

A. Just about April Fool's Day.

Q. What day was it in May that they went to a doctor? What day were you examined by Dr. Gehrels, is that his name?

Mr. Clausen: Gehrels.

The Witness: I honestly don't remember.

Mr. Scholz:

Q. I think you testified it was in May. At least I have May.

A. Well, I know I saw him at least on my birthday, be- [fol. 186] cause I know I saw him on my birthday, and that was May 11th.

Q. When you arrived home on April 1st, what did you do between April 1st and May 11th, or about May 11th? I think it was before May 11th, actually. I think you went there at least on May 2nd.

A. I went to my sister's.

Q. Pardon?

A. I went to my sister's in Palo Alto.

Q. And then you were employed by the Shell Oil Company?

A. Skelly.

Q. Skelly Oil Company, and you were a typist there, or secretary?

A. I think I was listed as a steno.

Q. Were you working 40 hours a week then?

A. Well, they got a little provoked and took off so much sick leave. I would say that was my average duty tour.

Q. As a steno you typed papers, whatever they gave you to type?

A. That is right.

Q. You did some filing?

A. Very little filing.

Q. Then you left there and you went to the Corps of Engineers?

A. Yes, sir.

Q. You were a stenographer in the Corps of Engineers?

A. I am still listed as a steno there.

[fol. 187] Q. Do you type there, too?

A. Very little.

Q. I think you stated you always sleep with your leg on a pillow, is that correct?

A. Almost always.

Q. Why did you do that?

A. Well, if I sleep with my back flat and my legs up this way and on a pillow or a suitcase, it relieves the pressure on my side. It is what they call my exclusive spine. But if I sleep with my legs down, it pulls on my back.

Q. You did that before the accident, did you not?

A. No.

Q. You testified you always slept that way and I want to bring that out.

A. I meant I always tried to since the accident. In the hospital they put my legs up on pillows, trying to relieve the pressure in my hips and back.

Q. At the scene of the accident the only light was the light from the Crystal Breakwater beacon?

A. That is all I remember.

Mr. Scholz: That is all.

Mr. Clausen: Your Honor, I have a doctor here. May I put the doctor on out of order before the redirect?

The Court: Certainly.

Mr. Clausen: Call Dr. Garland.

[fol. 188] LEO HENRY GARLAND, called as a witness on behalf of the plaintiff, sworn.

The Court:

Q. What is your full name?
A. Leo Henry Garland.
Q. Where do you reside?
A. 2853 Green Street.
Q. Your business or occupation?
A. 450 Sutter Street.
Q. Do you specialize in any particular branch of medicine?
A. X-ray and radium.
Q. X-ray and radium?
A. Yes, sir.

Mr. Scholz: If Your Honor please, I have known Dr. Garland for a number of years. In fact, we went skiing together with him, and I will accept his qualifications, if that is acceptable.

Mr. Clausen: It certainly is. Thank you very much, Mr. Scholz.

Direct examination.

Mr. Clausen:

Q. Dr. Garland, I hand you here three X-ray plates taken of Mrs. Althea Williams on April 15, 1949, and I will ask you to refer to those, please, and refer to your notes and tell me did you on that date, Dr. Garland, or under your supervision did your office take those X-rays?
A. It did.
[fol. 189] Q. Do you have the report that you made at that time, Doctor?
A. I have a copy of it.
Q. I have the original here, or copy of it, but you may use yours if you wish, Doctor.
A. It doesn't matter. They speak for themselves. The X-rays show fractures.
Q. Let me ask you this, Doctor. You may refer to your report if you wish. Doctor, on what day were the X-rays taken?

A. On April 15th, 1949.
Q. At whose request, Doctor?
A. At the request of Dr. Gehrels.
Q. Is that Dr. Ernst Gehrels?
A. That is correct.
Q. Here in San Francisco. Do you know whether he is a physician and surgeon?
A. Yes.
Q. You also know at the present time he has just had some hospitalization and is himself hospitalized?
A. Yes.
Q. Doctor, the plates that you have there consist of three. Will you take one of them, please, and read that for me?
A. Certainly.

The Court: Do you need a lamp?
The Witness: No, sir, it is not necessary. It shows fractures of the left second, third and fourth lumbar transverse [fol. 190] processes.

Mr. Clausen:

Q. Doctor, would you let me have that one, please? Would you indicate on this picture just where those fractures are to me?
A. There, there and there (indicating).

The Court: I would like to have them put under the lamp. I have some difficulty under all circumstances with X-rays.
The Witness: Your Honor, there is a fracture at this point in the left second lumbar transverse process, an oblique fracture in the left third and an oblique fracture in the left fourth, the most obvious one being the third, because it happens to have separation of the fragments of pretty gross degree.

Mr. Clausen:

Q. Doctor, will you take another one. We will offer this in evidence.

The Court: Let *is* be admitted and marked.

(The x-ray film referred to was thereupon received in evidence and marked plaintiff's exhibit 3.)

A. This is the other half of a stereoscopic pair of films, and shows the same findings previously noted. In addition, this shows a line across the left first transverse process, which is probably but not absolutely due to another fracture.

The Court: Let us mark this.

Mr. Clausen: May I introduce this plate in evidence as plaintiff's next in order?

[fol. 191] (The X-ray film referred to was thereupon received in evidence and marked Plaintiff's Exhibit 4.)

The Witness: This is a side view and shows that there is no X-ray evidence of fracture of any of the lumbar bodies, which are really the important parts of your spinal column.

Mr. Clausen: We will introduce that in evidence as plaintiff's next in order.

The Court: It may be admitted and marked.

(The X-ray film referred to was thereupon received in evidence and marked Plaintiff's Exhibit 5.)

Mr. Clausen:

Q. Doctor, give us your conclusions in brief. Would you refer to your notes and let me have them?

A. The conclusions are fractures of the left first, second, third and fourth lumbar transverse processes.

The Court:

Q. As I sit here, Doctor, would that be on the left or right?

A. As you face it it would be on your right, but on myself it would be on my left.

Mr. Clausen:

Q. In view of the fact that Dr. Gehrels is hospitalized, and won't be here for about two weeks—I can have him here if the Court desires, but it may not be necessary, in view of the fact that I have Dr. Feehan's deposition, but some of the terms Dr. Feehan uses are perhaps not entirely clear to me, and I am going to anticipate by asking this doctor if I may what some of these things mean that Dr. Feehan [fol. 192] is stating here. For example, on page 2 of the

deposition of Dr. Feehan, in answer to a question, interrogatory No. 13 as to his findings on examination, the doctor said in one finding, which was No. 2 of the findings, that she had muscle spasm in the right cervical spine.

Q. May I ask you, Dr. Garland, what is muscle spasm?

A. It is just a contraction of a muscle, with or without pain.

Q. And then in finding No. 3 the doctor says there was muscle spasm in the lumbar area with marked limitation of motion, anterior flexion being limited to 45 degrees and hyperextension nihil.

A. Nil. That's n-i-l. That's a typographical error for "nil".

Q. I thought it was, Doctor. As finding No. 5, "She was very tender on pressure over the lower end of the sternum." Where is the sternum, Doctor?

A. The breastbone.

Q. Finding No. 6. There is a vague area of sensory diminution which did not follow dermatone distribution on the right leg.

A. Dermatone distribution is the distribution of the sensory pattern normally following a certain nerve.

Q. Then on page 3, interrogatory 21, part of the answer was "On each examination excepting the first she had a preexistent and unilateral positive Ober test on the right side."

A. An Ober test is a leg extension test, named after [fol. 193] Professor Ober, who is a surgeon, and when the leg cannot be extended in a certain manner it is indicative of muscle spasm.

Q. In that case is that a positive Ober test?

A. Yes.

Q. Also in that same interrogatory she also had limitation of motion in the lumbar spine. That is the lower——

A. The lower back.

Q. In response to interrogatory 28, "It is my opinion that the patient's condition now is permanent and she will always have the disability that exists now, and even though future surgery is done to release the contracted ilia tibial bands of the right leg."

A. The ilia tibial bands are long bands of fiber tissue

running along the outer aspect of each leg from the ilium, the hip bone, down to the tibia, the shin bone.

Q. In response to interrogatory No. 33 the doctor said, "In my opinion she should be given the benefit of fasciotomy."

A. That is where you divide this fibrous band in the hope of releasing the spasm and tension.

Mr. Clausen: Thank you very much.

Cross-examination.

Mr. Scholz:

Q. Doctor, I show you here defendant's exhibit E, which is the report from the 22nd General Hospital. It says, "Discharged 24 March". I assume it is the 24th of March, 1949. And I show you the final diagnosis:

[fol. 194] "Fractured simple left transverse process of the lumbar 2, 3 and 4."

Is that in your opinion correct?

A. That is correct. That fits my diagnosis perfectly.

Mr. Clausen: Your Honor, may the plaintiff be excused temporarily?

The Court: Very well.

Mr. Scholz:

Q. Doctor, the deposition of Dr. Feehan, taken on behalf of the plaintiff—where is that, in Kansas City?——

A. Yes, sir.

Q. —states that the Ober test and the Patrick's test were negative. What does that mean?

A. That means that on that particular day, as he performed the Ober test, he did not—evidence of spasm or contraction of this fibrous band.

Q. What about the Patrick test?

A. The Patrick test, sir, you have me. I can tell you about St. Patrick.

Q. You will get the Court's ancestors mixed up in this now.

A. Sir, you have me. It may be a local term in the Kansas City area for a certain type of leg test.

Q. Kansas City is still in the United States, though, isn't it?

A. Yes.

[fol. 195] Q. He says she had a negative——

A. LaSegue sign.

Q. What does that mean?

A. That is a similar general test for contraction of muscles or for spasms of muscles and named after a French scientist named LaSegue.

Q. He says, "On my first examination I made the following findings: she had a negative LaSegue sign. Ober test—" and we will leave out St. Patrick for the time being—"were negative." Then you would say she did not have anything wrong with the fibers of the leg?

A. Yes, I would say as he performed the test that he found no evidence of this spasm, etcetera.

Q. He says, "The X-ray examination was as follows: the antero-posterior view of the pelvis and lumbar spine demonstrated a healed fracture of a transverse process on the left side. There is normal bone density, correct relationship and alignment." Would that mean it was completely healed?

A. What is the date of that alleged report?

Q. You had better read it—sometimes my French pronunciation——

A. I wonder what date that would be, because he is missing——

Q. He is talking about the X-ray now. His X-ray examination was positive.

A. Oh, November, 1949.

Q. That is right.

[fol. 196] A. Ours was April. It is possible that it had healed completely.

Q. That was not my point. What I want to bring out, I am reflecting upon yourself because I am satisfied you are an expert on that. I ought to know that, I think. But what I am asking is, does that show when his examination was taken on November 9th that they had completely healed?

A. That is right, according to his interpretation of the X-rays.

Q. That is right, according to his interpretation?

A. Yes, sir.

Q. Still speaking about the X-ray, because that is what you specialize in, X-rays?

A. That is right.

Q. So I do not want to get you into some other field out of your specialty.

A. The A-P view of the thoracic spine did not reveal any evidence of fracture.

Q. Dislocation, bone disease or pathology?

A. Yes.

Q. Was that the same as your interpretation of the month before?

A. We did not X-ray the thoracic spine. We just X-rayed the lumbar.

Q. Then the lateral view of the thoracic spine did not [fol. 197] reveal any evidence of fractures of dislocations?

A. That is right. Again that is referring to his own report, his own examination.

Q. There is some moderate amount of wedging of the upper thoracic bodies with slight arthritic deposits?

A. Yes.

Q. What causes arthritic deposits, if you know? Am I taking you out of your specialty?

A. Wear and tear on human tissues.

Q. Did you take an X-ray of the cervical spine?

A. No, sir.

Q. Here he says, "X-ray examination of the cervical spine did not reveal any evidence of fracture of dislocation." My question would be, would the X-ray disclose that if there was any?

A. If there were a major fracture of the cervical spine previously present there would still be some trace of it.

Q. Doctor, have you told the Court everything the Court should know so far as your examination is concerned that would be of importance either for or against?

A. I believe so, sir, and this copy of my report is in evidence if it is so desired.

Mr. Clausen: I will offer that in evidence.

The Court: Let it be admitted and marked.

(The medical report referred to was thereupon received [fol. 198] in evidence and marked Plaintiff's Exhibit 6.)

Mr. Scholz: Excuse me for just a minute while I look over this report.

Q. Do I understand you correctly, Doctor, that you did not make an examination of the spine?
A. We X-rayed the lumbar spine, that is all.
Q. All you found were three broken ribs, in my terminology?
A. Well, transverse processes. Three broken wings, perhaps might be better.

Mr. Sholz: I think that is all.

Mr. Clausen:

Q. You have practiced your specialty, Doctor, for how many years?
A. 25 years.

Mr. Clausen: Thank you, Doctor, that is all.
The Court: We will take a recess for a few minutes.

(Recess.)

ALTHEA WILLIAMS, previously sworn, resumed the stand.

Redirect examination.

Mr. Clausen:

Q. I do not think I asked you your age, Miss Williams. How old are you, please?
A. I am 29. I will be 30 May 11th.
Q. Before you left for Guam, as you have detailed yesterday, did you pass a physical examination?
[fol. 199] A. Yes, sir.
Q. I believe you were to get us a date of your present salary; in other words, the date your present salary started. About when was that?
A. About the last week of October or the first week of November.
Q. All right.
A. That is the date I got the check.
Q. With regard to the time when you first saw Dr. Gehrels, does the fact that Dr. Garland testified he made his report

at the request of Dr. Gehrels on April 15, 1949 refresh your recollection?

A. Yes, sir.

Q. I beg your pardon?

A. Yes, sir.

Q. About when did you first see Dr. Gehrels?

Mr. Scholz: I will object to that on the ground that you are impeaching your own witness. She said she could only recall May 11th. I think she has testified to that several times. I have stated I am satisfied with at least May 2nd. I think on cross-examination she said it was in May. Now you are impeaching your own witness.

Mr. Clausen: I can't see that, Your Honor. The witness I do not think was sure of the date, and it is obvious she saw Dr. Garland before the X-ray man, since he took the [fol. 200] X-rays at the request of Dr. Gehrels.

Mr. Scholz: That must be true. But I am saying about her testimony.

The Court: There is nothing before the Court, gentlemen. Proceed.

Mr. Clausen:

Q. About when did you see Dr. Gehrels as far as you can recall?

A. I said it was at least before my birthday, which was May 11th. I know I saw him that day, and I am sure I saw him before, and I am sure I saw him—well, I can tell you how I know sort of when I saw him. Can I do that?

Q. About when was it? Was it before April 15th, 1949, the date the X-ray report was made by Dr. Garland?

A. I rather think I saw him the first ten days I came back.

Q. And you came back?

A. About April Fool's Day.

Q. In response to a certain question, or, rather, there was an exhibit introduced in evidence by Mr. Scholz concerning a completion of a contract, and I believe you testified that a certain contract that you had was considered completed, is that correct?

A. Yes, sir.

Q. And not the Morrison-Knudsen contract?

A. Well, my contract with MK was completed but not MK's with the army.

[fol. 201] Q. In connection with some of your illnesses and in connection with the deposition of Dr. Feehan I want to ask you this question: Has there been any irregularity in your menstruation since this accident?

A. Yes, sir.

Q. In what respect?

A. Well, I usually do about twice a month now.

Q. Is that different from before the accident?

A. Oh, yes, sir.

Q. So far as the fee is concerned, are you satisfied to have the Court fix a reasonable fee in this case in the amount allowable by law and included as a part of the judgment?

A. Yes, sir.

Mr. Clausen: That is all.

Mr. Scholz: No questions.

OFFERS IN EVIDENCE

Mr. Clausen: Your Honor, we by stipulation are going to offer in evidence a report of Gehrels to me of May 2nd, 1949, and I state to counsel and to the Court that should either counsel or the Court desire Dr. Gehrels, I can produce him here. I checked last night and he will be available in two weeks.

Mr. Scholz: Yes, Your Honor, that stipulation is correct, except I want to call the Court's attention, as I call to yours, that the first part of this is all history, that is, what Miss Williams told the doctor, not what he found. Is that cor-

[fol. 202] rect?

Mr. Clausen: That is right, the history.

Mr. Scholz: She gave the doctor.

Mr. Clausen: Counsel is referring to the second paragraph, Your Honor. This is on the letterhead of Ernst Gehrels, M. D., 450 Sutter Street, San Francisco 8. The date is May 2nd, 1949, addressed to myself, Henry Clausen, Attorney-at-Law, 315 Montgomery Street, San Francisco, California.

(Thereupon plaintiff's exhibit 7 was read.)

The Court: What is the date on that?
Mr. Clausen: May 2nd, 1949.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit No. 7.)

Mr. Clausen: At this time, Your Honor, we offer in evidence the deposition of Dr. Feehan.

Deposition of Dr. William J. Feehan

Note:

(The Deposition of Dr. William J. Feehan here introduced in evidence is not copied below for it has already been set forth at pages 67 to 80. The only objections to any portion of such deposition when it was read in evidence follow:)

Q. In your opinion was this condition you so found the result of the accident she underwent in March, 1949 on Guam?

Mr. Scholz: Your Honor, I think I should make an objection to that. This examinaiton was a considerable time later [fol. 203] and I don't know that even an expert should state that what he found was the cause of an accident which he never saw or heard of months prior.

Mr. Clausen: In answer to that, Your Honor, this doctor examined her on November 9 of the same year, in which she was hurt, and I am asking him in this question whether what he found was caused by the accident on March 3.

The Court: Objection overruled. It goes to the weight of the testimony.

"A. In my opinion, the conditions, I found on my numerous examinations are the result of the accident that she described as having happened to her on March 3rd, 1949. (See page 72 of this transcript.)

• • • • • • •

Q. What future medical treatment is indicated, and please give the reason for your opinion.

Mr. Scholz: I will object to that on the ground it has already been asked and answered.

Mr. Clausen: He tells a little more why he thinks she should have this operation.

The Court: The objection is overruled.

A. She has, persistently, on the last examinations, had a positive Ober test on the right side, which, theoretically, is the cause of some back ache, because of a slight tortion or twist of the pelvis in the lumbar area of her spine. (See page 76 for balance of answer and continuance of testimony.)

[fol. 204] Mr. Clausen: At this time, Your Honor, we offer in evidence the affidavit from the army file of the man who was in the car in which Miss Williams was sitting, that is, Mr. Muzzy, by stipulation. This is part of the army file. Do you have the original there? I will use the original.

Mr. Scholz: That is all right. You can use that.

AFFIDAVIT OF A. C. MUZZY

Mr. Clausen: "Affidavit.

I, A. C. MUZZY, being first duly sworn, do make the follow-
[fol. 205] ing voluntary statement. I have been advised of my rights and understand that I do not have to answer any question the answer to which might incriminate or degrade me, or to answer any question not material to the issue. This statement is given of my own free will without promise of reward, coercion or threats, nor has any force been used to induce me to make this statement.

"Q. Were you involved in an accident on 3 March 1949, while operating MK-PK Pickup No. 5704?

"A. Yes.

"Q. Were your authorized to operate this vehicle?

"A. Yes, I have Permanent Trip Ticket No. 63 which authorizes me to use any MK-PK vehicle.

"Q. Were you on official business at the time of the accident?

"A. No.

"Q. Did you sign a 'Statement of Liability' when applying for your Permanent Trip Ticket?

"A. Yes.

"Q. Where did the accident happen?

"A. On the Crystal Breakwater.

"Q. Were you injured in the accident?

"A. Yes. Shoulder and back. Not sufficient for medical treatment.

[fol. 206] "Q. Did you have any passengers in your vehicle at the time of the accident?

"A. Yes. Miss Althea Williams MK-PK employee.

"Q. Was she injured in the accident?

"A. Yes, she is presently in the 22nd General Hos*ptial.*

"Q. Was the driver of the other vehicle injured?

"A. I do not know; but I believe he was not, as I saw him run away after the accident.

"Q. What was the identification or number of the vehicle which struck your vehicle?

"A. 4x4 Weapons Carrier, ¾ Ton, USA #2278365-S assigned to 374th T. C. W.

"Q. Were there any passengers in the other vehicle?

"A. I am not positive, but I believe there were not.

"Q. Will you state in your words how the accident happened?

"A. At approximately 2230 hours, I had parked MK-PK vehicle No. 5704 at the end of the Crystal Breakwater facing west. My parking lights and tail lights were on. I was sitting in the driver's seat; Miss Williams was sitting beside me with her back to the right hand door. We observed a vehicle approaching about a quarter of a mile away, at a speed which I estimated to be in excess of 35 miles per hour. The headlights of the oncoming vehicle were on and were bright. [fol. 207] Miss Williams remarked that the vehicle was moving very fast. The next thing that happened was that the vehicle smashed into the right side of our vehicle, turning our vehicle around and facing it in an easterly direction. The vehicle that collided with my vehicle also was turned in an easterly direction. Immediately after the accident I looked up and saw a man run away down the Crystal Breakwater toward Hoover Junction. I did not chase him but turned my attention to Miss Williams. After what seemed about a half hour a jeep operated by MP Boltan arrived. There

were two men with him. I believe they were sailors. The vehicle was a Marine or Army Police vehicle. Miss Williams and I got into the vehicle and left the scene of the accident. Somewhere along the way to Marine Drive Boltan made a 'phone call. He left one of the sailors at the scene of the accident and the other sailor at the beginning of the Breakwater road. He then drove Miss Williams and I to the Camp Edusa Women's Compound *were* I left Miss Williams as she preferred to go to her room. I then returned to the scene of the accident with Boltan. When I arrived at the scene I observed a navy wrecker preparing to [fol. 208] remove the pickup. I did not request or approve the removal of the pickup by the wrecker. I was then taken to NOB Security where a statement was taken from me.

"Q. Were you sober at the time of the accident?

"A. Yes. Neither Miss Williams nor I had any intoxicating drinks that night, nor were we under the influence of narcotics.

"Q. Can you identify or describe the man you saw running from the scene of the accident?

"A. No.

"Q. Can you state whether or not he was the driver of the vehicle which collided with your vehicle?

"A. Yes. When I first observed him; he was running from the driver's side and only a few feet from his vehicle.

"Q. Was the other vehicle damaged?

"A. No.

"Q. Did the man who was running away seem to stagger or give any indication of intoxication?

"A. I could not state.

"Q. Did you have an Army Motor Vehicle Operator's Permit at the time of the accident?

"A. Yes, (witness exhibited Army Motor Vehicle Operator's Permit No. 2197, 23 March 1948).

"Q. Was MK-PK Pickup operable after the accident?

[fol. 209] "A. No.

"Q. Was the other vehicle operable after the accident?

"A. Yes, when I returned to the scene of the accident, at which time the wrecker was moving my pickup, I rode four or five miles in the other vehicle to NOB Shore Patrol Headquarters, and noticed the lights, brakes, and *sterring* mechanism were in good condition. The windshield was also clear.

"Q. Was any other Government or private property damaged in this accident?

"A. No.

"Q. How much time elapsed between the time that Boltan arrived at the scene until he stationed the second sailor at the start of the Crystal Breakwater?

"A. Approximately 5 or 10 minutes.

"Q. What was the condition of the Crystal Breakwater road?

"A. Hard packed coral; smooth surface; in good condition—recently level.

"Q. What was the condition of light at the scene of the accident?

"A. It was a clear night and altho I believe there [fol. 210] was no moon, visibility was good.

"Q. Were there any lights on the Crystal Breakwater?

"A. Only a beacon light.

"Q. Was the road wet?

"A. No.

"Q. Was the road surface oiled?

"A. No.

"Q. In your estimation what do you believe was the cause of the accident?"

Mr. Scholz: That we object to. I do not believe he could testify in his estimation what the cause of the accident was.

Mr. Clausen: Except that it's part of the Army file that counsel has put in evidence, and it would seem to me that part would go to the weight, and since counsel has put in numerous documents to which I have not objected, I think this document should go in.

Mr. Scholz: I have no objection to the document going in. I am objecting to this part.

The Court: That was taken down shortly after the accident?

Mr. Scholz: Yes, it is part of the Army file.

The Court: The objection is overruled.

Mr. Clausen: (Continuing):

"A. Driver of the other vehicle was either drunk or [fol. 211] asleep. Probably drunk as his high speed would not have allowed him to stay on the road for the distance observed.

The Court: It is fair to make the statement in relation to that answer that that, after all, could not spell out anything. Do I make myself clear?

Mr. Scholz: No, Your Honor.

The Court: Repeat that.

(The answer was re-read.)

Mr. Clausen: That is what they asked for. That is why I say it goes to the weight.

The Court: You will have to have something to base that on. Proceed.

Mr. Clausen: I was next going to read the driver's own statement.

The Court: Let an objection be noted and it is admitted subject to a motion to strike.

Mr. Clausen: (Continuing):

"Q. Were you while parked obstructing the Crystal Breakwater road?

"A. No. I was parked in the semi-circular end of road. The other vehicle would have crashed into the boulders or into the sea, had he not hit my pickup.

"Q. Is there anything else you wish to state?

"A. Yes. I would like to have the driver of the other [fol. 212] vehicle tried for this offense.

"Q. Could you identify the man you saw running from the scene of the accident?

"A. No.

A. C. Muzzy.

"Subscribed and sworn to before me this 11th day of March, 1949 in accordance with my authority to take acknowledgements dated the 19th day of August, 1948, as provided by Chapter IV, Article IV, Section 1181(4) of the Civil Code of Guam, and filed in the Department

of Records and Accounts, Naval Government of Guam, the 23rd day of August, 1948.

My authority expires: 1 September 1949.

Woodrow W. Jay.

I introduce in evidence, Your Honor, the statement of the driver, Corporal Seabourn.

OFFERS IN EVIDENCE

"I, Joe R. Seabourn, Cpl., Headquarters Base Service Detachment 1, 24th A. D., being first duly sworn, do make the following voluntary statement. I have been advised of my rights under the 24th Article of War, and this statement is given of my own free will without promise of reward, coercion or threats nor has any force been used to induce me to make this statement.

[fol. 213] "I was born April 10, 1930, and my home address is Route #2 Somerset, Missouri. I enlisted in the Army with my parents' consent. I hold an Army Operator's Permit issued November 22, 1948 #2726 good for army motor vehicles up to 2-½ tons. I have had stateside driver's license in Oklahoma in 1946. Once I had my army driver's license suspended for speeding here on Guam. It was suspended for speeding in November 1948 for 30 days just after it was issued. It was suspended by my Company Commander. My father, Dallas Seabourn was a farmer but now he is a carpenter. My regular duties are as a clerk in supply and occasionally in the performance of my duties I drove a Weapons carrier. On Thursday, March 3, 1949, I did not work at all that day, I just took off. I stayed over at Harmon Field on the base until about noon time I left the base with some friends, Cpl. Benson and Pvt. Schmidt of my company. I had a proper pass to leave the base. We went to different places between Harmon Field and Agana and drank beer until we came back to the bararcks about 7 p.m. I have no idea how much beer

I drank but I was just feeling good. Then I got a trip ticket for a Weapons Carrier assigned to 374th T.C.W. I picked up this trip ticket from Sgt. Stiles [fol. 214] of my company. The trip ticket was made out to Pfc. Carbare of the 374th Supply Squadron altho he works with us. The trip ticket was good for that vehicle until 9:30 a.m. Friday March 4. The trip tickets in service stock are always passed around between the men working in the section regardless of the name of the individual the trip ticket was made out to."

Mr. Scholz: I think that would be objectionable, Your Honor, because under the Army regulation the only persons who can use a car are those to whom the trip ticket is made out, and Army regulations are part of the laws. They have the same force and effect as the law. 168 Federal 2d 288.

Mr. Clausen: If the Court please, this was the practice there in Guam at that time with respect to this particular man.

The Court: His answer to that is that it is a violation of the law.

Mr. Clausen: No, it is not a violation of the law.

The Court: I will give you a record on it and allow it to go in subject to your motion to strike and over your objection.

Mr. Clausen: When I say it is not the law, I know whereof I speak.

The Court: I will give both sides an equal opportunity. [fol. 215] I will allow it to go in so you will have a record on it, subject to your motion to strike.

Mr. Clausen: (Continuing):

"The trip tickets in service stock are always passed around between the men working in that section regardless of the name of the indvidual the trip ticket was made out to. That was the usual procedure whether the use of the vehicle was official business or recreation of the individual using it. In my case on March 3, my use of the vehicle was for recreation, altho the trip ticket was issued for official business. After I got the

Weapons Carrier, Benson Schmidt and I went over to 20th Air Force E. M. Club where we drank some more beer. I have no idea how long we stayed there, but we decided to go for a ride. The last I remember of the events of the night of March 3, 1949, was when I let Benson and Schmidt out of the Weapons Carrier in Agana. I have no idea what time it was that I let them out of the Weapons Carrier. I don't know why they got out of the Weapons Carrier at Agana because I don't remember, but on Friday, March 4, 1949 they told me that I was arguing with them because I was drunk. What happened after Benson and Schmidt left me that night in Agana I haven't the slightest recollection. I don't remember driving the Weapons Carrier down [fol. 216] Marine Drive to the Breakwater nor driving it on the breakwater road to the end, and neither do I remember hitting a parked MK-PK Pickup #5704 at the sea end of the breakwater road, and neither do I remember getting out of that Weapons Carrier after the accident and running down the embankment road towards the shore. I don't remember anything until I awoke beside the road, Marine Drive, below Hoover Park, as you go towards Apra Harbor from the breakwater. I was lying beside the road when I awakened about 8 or 9 a.m. Friday, March 4. I have no idea how I got there. I do not remember giving the truck to anyone else to drive after I let Benson and Schmidt out of it in Agana. When I awakened by the side of Marine Drive Friday, March 4, about 8 or 9 a.m. I hitchhiked back to camp and washed up. Then I went out and found Schmidt and Benson and tried to find out what had happened the night before, but since they weren't with me after they left me at Agana, they didn't know. Then I went to Sgt. Seaman's office in service supply to report the Weapons Carrier as lost. However, the fellows in the office told me that when he found the Weapons Carrier and me missing that morning, he, Sgt. Seaman went out look- [fol. 217] ing for me and the Weapons Carrier. He came back with the Weapons Carrier sometime Friday afternoon and told me that I must have been in a wreck

on the breakwater road. Then Lt. Werb came in and questioned me about the facts of the accident, but I was unable to tell him anything except that I didn't remember anything after I was in Agana. Lt. Werb restricted me to the area. On Saturday, March 5, I worked until about 9 a.m. when Sgt. Seaman told me to take the rest of the day off and also told me to turn in the trip ticket I had on the Weapons Carrier to the Motor Pool so that a new trip ticket could be issued for the Weapons Carrier. I was not getting this new trip ticket for myself but for the use of the others in the section. Mechanically the Weapons Carrier I was driving Thursday night March 3, was in perfect condition, the lights, brakes, and steering system were in perfect operating condition. I was not injured in the accident involving this Weapons Carrier and MK-PK Pickup #5704.

"I have read this two pages and understand them and there are true to the best of my knowledge.

(S.) Albert S. Cole, Special Agent, Guam District, CE.
(S.) Joe R. Seabourn, Cpl.

[fol. 218] "Subscribed and sworn to before me this 7th day of February 1949 in accordance with my authority to take acknowledgements dated the 19th day of August 1948 as provided by Chapter IV, Article IV Section 1181 (4) of the Civil Code of Guam, and filed in the Department of Records and Accounts, Naval Government of Guam, the 23rd day of August 1948. My authority expires 1 September 1949.

(S.) Woodrow W. Jay

Certified a True Copy:

W. W. Jay

Civilian Official in lieu of Claims Officer
Guam District, Corps of Engineers"

Your Honor, I have here the NOB Shore Patrol Headquarters traffic accident report which was made by W. Powell on the day after the accident March 4, 1949. I will introduce those three in evidence as one exhibit.

The Court: They may be admitted and marked.

(The report referred to was thereupon received in evidence and marked Plaintiff's Exhibit 8.)

Mr. Clausen: Your Honor, so far as the army law is concerned——

The Court: Let us marshal the facts in the case first.

Mr. Clausen: I was going to say, Your Honor, so far as [fol. 219] the law is concerned I have under subpoena Major Madden of the Judge Avocate's office of the Fifth Army, and Major Madden telephoned to me and stated that on receiving the subpoena he had called Mr. Scholz, and that Mr. Scholz had stated to him that he would stipulate to certain regulations as being in force, and the situation in respect thereto. So if that is correct, then I do not need to call him down. This is what he said you would stipulate to, that a soldier is on duty 24 hours a day; that at the time the accident happened on Guam, as well as other overseas posts, there are orders to the effect that personnel may use army vehicles for recreation, and that this is a special edict for morale purposes.

Mr. Scholz: No, I can't—he asked me about that first one; he did not say about the second one. He asked me if I would stipulate that a soldier is on duty 24 hours a day, which is true, just like the policemen. But I said, of course, when he is on leave or is not on official business, that he is not in the course and scope of his employment. The second part he never mentioned to me. I think the best evidence of the army regulations are the army regulations themselves, although I will stipulate that they are on duty 24 hours a day, or, rather, they are subject to call on duty. In other words, if they get a leave or a pass, whether it is 24 hours or three months, they are subject to being recalled just like the police department is, but I wanted to distinguish so there won't be any questions about [fol. 220] it. When they are on leave, then they are not in the army; they are not on active duty.

Mr. Clausen: Your Honor, we will save time. I will get Major Madden here. We are now on a subject on which I spent three and a half years of the good years of my life in the army; I was in the Judge Advocate's office. I think Mr. Scholz is incorrect in his statement.

The Court: I haven't any case in mind, but it is important to this case.

Mr. Clausen: I have a decision right on the point, Your Honor, in this circuit.

The Court: Did you exhaust the law side on that point?

Mr. Clausen: Yes, and I have it, Your Honor. I can give Your Honor the citation now.

The Court: When will this witness be available?

Mr. Clausen: I will phone him immediately.

The Court: We will take an adjournment until two.

Mr. Clausen: He will be available at two o'clock.

The Court: We will take an adjournment until two.

[fol. 221] Afternoon Session, February 19, 1952

Mr. Clausen: If the Court please, I offer in evidence at this time the bill of Dr. Ernst Gehrels dated February 18, 1952 addressed to Miss Williams for services between April 11, 1949 and May 16, 1949 in the sum of $300, and it will be stipulated between myself and Mr. Scholz that if Dr. Gehrels were called, he would testify that the charge of $300 was reasonable.

The Court: Let the record so show.

(The bill referred to was thereupon received in evidence and marked U.S. Exhibit No. 9.)

Mr. Clausen: At this time, Your Honor, we offer in evidence the deposition of Sgt. Joe Seabourn, the party who was supposed to have driven the other vehicle, and with the cooperation of Mr. Scholz, we will alternate with the questions and answers.

Mr. Scholz: What do you want to do? Read the questions or answers?

Mr. Clausen: Suppose on your part I will read the questions and you read the answers, and on the cross you read the questions and I will read the answers.

"Deposition of Joe R. Seabourn

[fol. 222] *Note*:

The questions and answers in the deposition of Joe R. Seabourn set forth on pages 50-58 of this transcript were not objected to and are not reproduced here to avoid duplication. The balance of the deposition with objections made and ruled on follow.)

"Q. It is correct, is it not, that the trip tickets, including the said trip ticket, mentioned in the service stock were always passed around between the men working in that section, regardless of the name of the individual to whom the trip ticket was made out?"

Mr. Scholz: If Your Honor please I am going to object to that question and answer upon the ground that a corporal cannot circumvent or interpret or define the army regulations, and it calls for his conclusion.

Mr. Clausen: In answer to that, Your Honor, I will make the same answer I made this morning. The evidence here will show that that was the procedure, that there was no regulation violated. There was no regulation there. Furthermore, the case I have is decisive on that point and on this section. The Court there permitted evidence on a vehicle for recreation.

The Court: Is that the Denman case?

[fol. 223] Mr. Scholz: Yes, Your Honor.

The Court: Did you read the Denman Case?

Mr. Scholz: The Murphy case?

The Court: Yes.

Mr. Scholz: Yes. I did not try that case. I had something to do with preparing the appeal in the case. We advised the Attorney General to take an appeal in the case. It is too broad, in our opinion.

The Court: They refused to obey your instructions to the Attorney General?

Mr. Scholz: The Attorney General refused to take an appeal on it.

The Court: Then that is the law of the case so far as the circuit is concerned.

Mr. Scholz: I think that case still can be distinguished

from this case, and I am prepared to argue on that at the proper time.

The Court: I will allow the testimony then so that counsel does not waive any of his legal rights.

Mr. Clausen: The answer to question 24 that counsel just read is: "Yes, sir."

"Q. State whether that was the usual procedure, whether the use of the vehicle was official business or recreation of the individual using it."

Mr. Scholz: Same objection, Your Honor.

The Court: Same ruling.

"A. Well, everybody who drove it used it for the same thing I was using it for. When they weren't using it in service stock they drove it at night."

The Court: To keep up the morale of the soldiery.

Mr. Clausen: That is correct, Your Honor, that is the decision.

Mr. Scholz: We are going to offer evidence to contradict that statement here.

The Court: If you arouse yourself I will be taken by surprise. Proceed.

"Q. State whether the trip ticket in question while issued therefor for official business was by this usual procedure also for your use of the vehicle for recreation?"

[fol. 224] Mr. Scholz: Same objection.

The Court: Same ruling.

"A. No, sir; I don't guess it was. I don't know whether they issued trip tickets like that or not. I never did check out one for recreation."

Mr. Scholz: I will withdraw my objection.

"State whether the said trip ticket in 'service stock' was similar in effect and purpose to the prior use by yourself and other men in that department.

[fol. 225] "A. Yes, sir."

Mr. Scholz: Same objection.
The Court: Same ruling.

"Q. State whether you were working in that service stock section in which the trip ticket was issued.

"A. Yes, sir.

"Q. After you got the trip ticket on the day of the collision, namely, March 3, 1949, did you get the Weapons' Carrier?

"A. Yes, sir.

"Q. Who, if anyone, went with you and were passengers?

"A. Sgt. Benson and Private Schmidt were passengers.

"Q. Were you driving the car?

"A. Yes, sir.

"Q. Where did you go up to the time and place of the collision?

"A. We went to 20th Air Force NCO Club, then we left there and went to Agana, and that's the last I remember.

"Q. How much beer did you then drink?

"A. I don't know, sir.

"A. What do you remember of the events up to the collision and what is your first recollection thereafter?

[fol. 226] "A. Well, sir, the last I remember, I left Benson and Schmidt out in Agana. Then I woke up the next morning and the sun was shining. That's all.

"Q. Did anyone else drive the Weapons' Carrier from the time you got the trip ticket and the Weapons' Carrier up to the time and place of the collision?

"A. I do not know, sir.

"Q. What happened to the passengers in the Weapons' Carrier with respect to whether they were driving with you at the time and place of the collision?

"A. No, sir, they wasn't with me.

"Q. When did you return to your outfit after the collision?

"A. Well, sir, it was that morning. I don't know exactly; it might have been around ten o'clock.

"Q. What did you do with the trip ticket that you

had on the Weapons' Carrier which was involved in the collision?

"A. Well, sir, I gave it to Sgt. Seaman. I believe that was right—whenever he came in.

"Q. Was this Weapons' Carrier assigned to a motor pool from which you got it after you had obtained the trip ticket on the day of the collision?

[fol. 227] "A. Yes, sir.

"Q. Did you get a new trip ticket for yourself after the collision on the Weapons' Carrier?

"A. No, sir; I didn't get one.

"Q. Did you on March 7, 1949 make and assign the attached statement concerning the collision?

"A. Yes, sir.

"Q. Was it so signed and made before Albert S. Cole, Special Agent, Guam District, CE, and subscribed and sworn to before Woodrow W. Jay, as noted on the statement?

"A. Yes, sir; I don't remember his name but I remember Cole, but I don't remember the other one's name, sir.

"Q. Attach hereto any other written statements or reports made by you in connection with the collision.

"A. None, sir.

"Q. What disciplinary action, if any, was meted out to you for the collision?

"A. None, sir.

"Q. Is it not correct that at the time and place of the collision and as a member there of the armed forces that you were technically on duty 24 hours a day?

"A. Yes, sir.

[fol. 228] "Q. Attach hereto all pertinent regulations in respect of your answer to the last question.

"A. I don't know of any, sir.

"Q. For how long a period to your knowledge was the procedure, noted above, with respect to the mode and method of trip tickets covering army motor vehicles in effect on the island of Guam?

"A. Well, sir, I don't know that. Everything, as far as I know, was always the same since I got here.

"Q. Give the names, rank, grade and stations of the various people in the United States Stated armed forces, who, to your knowledge, authorized or followed the noted mode and method of trip tickets and procedure, prior to the date of the collision.

"A. Sgt. Seaman, Harmon Field; Private First Class Carbaro, Harmon Field; Staff SGt. Thomas Thompson; Private First Class Erp. I don't remember their first names; that's just about all I remember."

Mr. Scholz: I would like to pose the objection and ask that the question and answer be stricken out on the grounds it is hearsay and not pertinent to the case at issue.

The Court: The objection is overruled. I will allow the question and answer to stand.

"Q. When you stated in your statement, 'The trip ticket was made out to Private First Class Carbaro [fol. 229] of the 37th Supply Squadron although he works with us; state what work he did and with whom.

"A. The same job I worked at; issuing and drawing supplies.

"Q. When you set forth in your statement, 'The trip ticket was good for that vehicle until 9:30 a.m. Friday, March 4', state the mode or method of obtaining such a trip ticket, and by whom it was issued.

"A. Well, sir, I don't remember whether they had let us out on 24 hour dispatch. I don't remember if it was issued. We just went to the motor pool and asked them for the truck if it wasn't out to the section and drove it to the window and they would give you the trip ticket.

"Q. When you state in your statement, 'The trip tickets in service stock are always passed around between the men working in that section regardless of the name of the individual the trip ticket was made out to', state how long such a procedure had been followed to your knowledge in your section.

"A. Ever since I started to work in that section. I believe it was the last of August 1948."

Mr. Scholz: The same objection, Your Honor, and I ask that the question and answer be stricken out on the ground it is not binding on the government and on the [fol. 230] ground it is contrary to the regulations.

The Court: It may or may not be binding, and for that reason I will overrule the objection.

"Q. When you set forth in your statement, 'That was the usual procedure, whether the use of the vehicle was official business or recreation of the individual using it,' state how long that procedure had been followed to your knowledge in your section before the collision."

Mr. Scholz: Same objection.
The Court: Same ruling.

"A. I believe it started that month. When they started checking it out on 24 hour disptach they started checking them. Some worked at nights. I don't remember whether they were checking them out on 24 hour dispatch when I came. When I started working in service stock they did that.

"Q. State the individuals in your section who followed that procedure, including officers and enlisted men."

Mr. Scholz: Same objection.
The Court: Same ruling.

"A. Well, sir, everybody—all the officers had a jeep [fol. 231] assigned to them. They drove them and the enlisted men had three Weapons' Carriers, I believe, to use. There was Lt. Lutner, he had a jeep assigned to him, and Lt. Werb, he had a jeep assigned to him. The other two Weapons' Carriers, I don't remember who drove them but I know they drove them at night."

Mr. Clausen: The formal part I will not read, Your Honor, the concluding part.

I will offer in evidence the deposition of Richard C. Schmidt.

The Court: Identify Schmidt.

Mr. Clausen: Schmidt was the captain of Seabourn.
The Court: All right.
Deposition of Richard C. Schmidt

"Q. What is your name, rank and station?

"A. Richard C. Schmidt, private E-1, formerly corporal, Battery A, 108th Field Artillery Battalion, Camp Atterbury, Indiana.

"Q. Were you at any time during the 3rd day of March 1949 a passenger in the Weapons Carrier assigned to 374th TCW, being USAF2278365-S?

"A. Yes, during the evening hours.

"Q. Were you with Joe R. Seabourn?

"A. Yes, sir.

"Q. Was Seabourn authorized to take the vehicle as [fol. 232] far as you know? If so, give the name, rank, station and order of the person issuing the same.

"A. I assumed that Seabourn was authorized to take the vehicle, but I do not know for sure.

"Q. Was said Seabourn on duty the 3rd day of March 1949?

"A. No, sir.

"Q. What did he do that you know of during the entire day of 3 March 1949?

"A. We were together all day. We left camp and we went out drinking. That's about all we did, drinking and running around. It was about eight o'clock in the morning when we left, and we went to a tavern about a mile from Harmon Field. We stayed there most of the morning. Later that afternoon we went into Agana and other nearby places to drink and came back at night about 6:30 or 7:00 o'clock and got dressed and changed. That is when Seabourn got the truck. We left there about eight o'clock and went first to the NCO's Club at the 20th Air Force. We stayed there drinking until 8:30 or nine o'clock in the evening. After that we went in the truck to Agana. There Vincent and myself got off the truck about eleven o'clock and that is the last I know of Seabourn's whereabouts until the next morning.

"Q. While said Seabourn was with you, was he [fol. 233] intoxicated?

"A. Yes, sir.

"Q. Was Seabourn at any time during the third day of March 1949 performing any official duties?

"A. No, sir.

Cross-interrogatories

"Q. When and where did you enter the armed services of the United States which was in effect at the time of the collision?

"A. The 10th day of September, 1946, Philadelphia, Pennsylvania.

"Q. What was your assignment and what were your duties on the approximate date of the collision?

"A. I was in Aircraft Electrical Accessories repairman. I was in charge of a crew inspecting and overhauling aircraft on the date of the collision.

"Q. Under these duties what were you required to do and what did you do in pursuance of these duties?

"A. I inspected and repaired electrical appliances and accessories on aircraft.

"Q. On the date of the collision is it not a fact that you had a proper pass to leave the base?

Mr. Scholz: I object to that on the ground it is incompetent, irrelevant and immaterial. He was not the one who was driving the car involved in the accident.

[fol. 234] Mr. Clausen: All three of them had proper passes for recreational purposes, Your Honor.

The Court: For that limited purpose I will allow it. Overruled.

"A. Yes, sir, I had a class A pass to leave the post from the morning of the third until the morning of the fourth at reveille.

"Q. Is it not a fact that when Seabourn left the base that day before the collision he went to different places between Harmon Field and Agana, and drank beer until he came back to the barracks at about seven p. m.?

"A. Yes, sir.

"Q. State how much beer he drank.

"A. It was quite a lot, maybe 30 or 35 bottles of beer.

"Q. Is it not a fact that when he got back at that time he got a trip ticket for the said Weapons Carrier assigned to the 374th TCW?

"A. I don't know.

"Q. Is it not true that he picked up this trip ticket from Sgt. Stiles of your company?

"A. I don't know.

"Q. Is it not true that while the trip ticket was made out to Private first class Carbaro of 374th Supply [fol. 235] Squadron, who worked with Seabourn, that the trip ticket was good for that vehicle until 9:30 a.m. Friday, March 4th?

"A. I don't know.

"Q. Is it not correct, therefore, that the trip ticket was in effect at the time of the collision?

"A. I don't know.

"Q. It is correct, is it not, that the trip tickets, including the said trip ticket mentioned, in service stock were always passed around between the men working in that section, regardless of the name of the individual to whom the trip ticket was made out?

"A. Yes, sir, that is correct, although I don't know if this vehicle had a trip ticket."

Mr. Scholz: I just want to state by way of parenthesis, Your Honor, there are different companies involved here, different detachments.

"Q. State whether that was the usual procedure, whether the use of the vehicle was official business or recreation of the individual using it.

"A. Yes, sir, that was the usual procedure. When it was for recreation it was used for that purpose, and when it was for official business it was used for that purpose.

[fol. 236] "Q. State whether the trip ticket in question while issued therefor for official business was by this usual procedure also for your use of the vehicle for recreation?

"A. If there was a trip ticket the vehicle could have been used for official business or for recreation."

Mr. Scholz: I will make an objection that answer and ask that it be stricken on the ground that it calls for a conclusion and contrary to the regulations of the army.

The Court: If he knows, he may answer. The objection is overruled.

"Q. State whether the said trip ticket in 'service stock' was similar in effect and purpose to the prior use by yourself and other men in that department."

Mr. Scholz: Same objection.

The Court: Same ruling. You may answer.

"A. If this vehicle had a trip ticket it was undoubtedly similar in effect and purpose to these used by myself and other men in the department."

Mr. Scholz: The further objection that he said, "if". He doesn't know: "if there is a trip ticket", so how can he testify that there is a trip ticket he does not know exists?

Mr. Clausen: I was asking as to the procedure with respect to trip tickets. A photostatic copy is attached to [fol. 237] Mr. Seabourn's deposition.

Mr. Scholz: He is testing him about something he does not know, and the procedure as to trip tickets can vary. They can be for official business, for recreation, or somebody could just take it and go out on a joy ride.

Mr. Clausen: The witness says, Your Honor, that this was the custom and the procedure.

The Court: The custom and practice.

Mr. Clausen: Yes, Your Honor.

The Court: On that basis I will allow it.

"Q. State whether you were working in that service stock section in which the trip ticket was issued.

"A. No, sir.

"Q. After Seabourn got the trip ticket on the day of the collision, namely, March 3, 1949, did he get the Weapons Carrier?

"A. All I know is that he had gotten the Weapons Carrier, and I assumed he had a trip ticket."

Mr. Scholz: I move that that be stricken out.

The Court: What he assumed may go out.

"Q. Who if anyone went with Seabourn and were passengers?

"A. Myself and Corporal Raymond K. Vincent.

"Q. Were you driving the car?"

Mr. Clausen: May I interpolate, Your Honor? The pre- [fol. 238] ceding depositions use the name "Benson". What I assume they meant was Vincent.

Mr. Scholz: I will stipulate to that.

The Court: In any event, you have Mr. Vincent's deposition also.

Mr. Scholz: I will stipulate that the name is Vincent, and that is the reason I could not read that. It was typed over.

The Court: You did not have your glasses on.

"Q. Were you driving the car?

"A. No, sir.

"Q. Where did you go up to the time and place of the collision?

"A. We left Harmon Field, went to the 20th Air Force NCO's Club and from there to Agana where we got off. This all took about four hours.

"Q. How much beer did you then drink?

"A. After we got the vehicle, we rode to the 20th Air Force NCO's Club and drank mixed drinks and champagne. The three of us drank about five bottles of champagne.

"Q. What do you remember of the events up to the collision and what is your first recollection thereafter?

"A. As I said before, we went to the 20th Air [fol. 239] Force NCO's Club and after that to Agana where we left Seabourn in the Weapons' Carrier, at which time Seabourn was very drunk. I didn't see Seabourn or the truck until the next day.

"Q. Did anyone else drive the Weapon's Carrier from the time Seabourn got the trip ticket and the Weapons Carrier up to the time and place of the collision?"

Mr. Scholz: I object to that on the ground he can't answer that inasmuch as he left Seabourn way before the purported time of the collision.

The Court: The objection is overruled. Let the question and answer stand.

"A. Up to the time I left him in Agana about eleven o'clock no one else had driven the Weapons' Carrier while I was with Seabourn.

"Q. What happened to the passengers in the Weapons Carrier in respect to whether they were driving with Seabourn at the time and place of the collision?

"A. There was no collision during the time that Vincent and I were with Seabourn in the Weapons Carrier.

"Q. When did you return to your outfit after the collision?

"A. As I said before, I was not present when any [fol. 240] collision occurred. I returned to my outfit about midnight, having hitch hiked back to Harmon Field from Agana.

"Q. Did Seabourn on March 7, 1949 make and sign the attached statement concerning the collision?

"A. I don't know. I did not (?) Seabourn sign any statement.

"Q. Was it so signed and made before Albert S. Cole, Special Agent, Guam District, CE, and subscribed and sworn to before Woodrow W. Jay, as noted on the statement?

"A. I don't know anything about the statement.

"Q. Attach hereto any other written statement or reports made by you in connection with this collision.

"A. I made no other written statement or report in connection with this collision.

"Q. What disciplinary action, if any, was meted out to you for this collision?

"A. None because I had done nothing.

"Q. Is it not correct that at the time and place of the collision and as a member there of the armed forces that you were technically on duty 24 hours a day?

"A. I may be technically on duty 24 hours a day, but at the time I was with Seabourn I was on pass and I [fol. 241] was not present at any collision.

"Q. Attach hereto all pertinent regulations in respect of your answer to the last question.

"A. I don't have any regulations. All I know is that I was on pass.

"Q. For how long a period to your knowledge was the procedure noted above, with respect to the mode and method of trip tickets covering army motor vehicles, in effect on the island of Guam?"

Mr. Scholz: The same objection as heretofore.
The Court: I will allow it.

"As long as I was over there, and I was over there for about 15 months as of March 3, 1949.

"Q. Give the names, rank, grade and stations of the various people in the United States armed forces who, to your knowledge, authorized or followed the noted mode and method of trip tickets and procedure, prior to the date of the collision."

Mr. Scholz: Same objections.
The Court: Same ruling.

"A. Every one in my outfit used this procedure. I remember the names of Pfc. Slinker, Sgt. Raphael Herrera and Lt. John Reese. I can't remember any other names, and I don't know their present location, rank or station, or whether they are in armed forces any more.

[fol. 242] "Q. When Seabourn stated in his statement, 'The trip ticket was made out to Pfc. Carbaro of the 374th Supply Squadron although he works with us,' state *was* Pfc. Carbaro did and with whom.

"A. There was a Pfc. Carbaro who worked in the maintenance supply and issued parts and stock. I don't know who he worked with.

"A. When Seabourn set forth in his statement, 'The trip ticket was good for that vehicle until 9:30 a.m. Friday, March 4th, state the mode or method of obtaining such a trip ticket, and by whom it was issued.

"A. I don't know who issued the trip ticket which Seabourn had if he had one, but the method of obtaining trip tickets was to take the vehicle, which was

kept in the squadron area, down to the dispatch office and obtain a trip ticket from the dispatcher who was on duty. There was a dispatcher on duty 24 hours a day.

"Q. When Seabourn states in his statement, 'The trip tickets in service stock are always passed around between the men working in that section regardless of the name of the individual the trip ticket was made out to' state how long such a procedure had been fol-
[fol. 243] lowed to your knowledge in your section."

Mr. Scholz: The same objection.
The Court: The objection is overruled.

"A. That procedure was followed in the section I was in as long as I was assigned to the section. I was in the section about a year.

"Q. When Seabourn set forth in his statement 'That was the usual procedure whether the use of the vehicle was official business or recreation of the individual using it,' state how long that procedure had been followed to your knowledge in your section before the collision.

"A. That procedure was also followed during the time I was in the section, and I had been in the section, about a year before March 3, 1949."

Mr. Scholz: Same objection, and I move that the question and answer be stricken.
The Court: The motion will be denied. The objection is overruled.

"Q. State the individuals in your section who followed that procedure, including officers and enlisted men."

Mr. Scholz: Same objection.
The Court: Same ruling.

[fol. 244] "A. All the men in the section used the truck and some of the men that I remember who were in my section were Private first class Jack Slinker, Sgt. Raphael Herrera and Lt. John Reese, the same ones I mentioned before."

Mr. Clausen: We offer in evidence, if Your Honor please, the deposition of Staff Sergeant Raymond K. Vincent.

Deposition of Staff Sgt. Raymond K. Vincent.

Note:

The deposition of Sgt. Vincent had already been copied into this transcript as pages 32-42, and is not reproduced here to avoid duplication. The only objections to any portions of such deposition when it was read in evidence follow:
To the question 10 and answer on page 36, the following objection was made:

"Q. Is it not correct, therefore, that the trip ticket was in effect at the time of the collision?

"A. I don't know but I understood that it was since Seabourn mentioned that he was going to pick up the trip ticket."

Mr. Scholz: I ask the answer be stricken on the ground that his understanding is not evidence.

The Court: He said he did not know anything about this trip ticket in the case didn't he?

Mr. Scholz: That is right.

The Court: The objection is sustained.

[fol. 245] (Note: To question 16, page 37, the following objection was made)

"Q. After Seabourn got the trip ticket on the day of the collision, namely, March 3rd, 1949, did he get the Weapons Carrier?

"A. Yes; he picked up the Weapons Carrier."

Mr. Scholz: I object to that question. He stated he did not know whether Seabourn got the trip ticket. It is a compound question.

The Court: Let the question and answer stand in any event.

(Note: Thereafter the reading of the deposition was continued to the end without objection.)

Mr. Clausen: That is the end of the deposition, Your Honor.

I have just noticed that this witness Vincent mentioned that he had attached to the deposition a statement he made on the 14th day of March, 1949. There is a statement here, I see, and perhaps I should read that to have the record complete. I will skip over, Your Honor, the first part. I see this is a joint statement by both Schmidt and Vincent, apparently, the two companions of Seabourn. That is dated March 14, 1949, eleven days after the accident, Your Honor.

The Court: Very well.
Mr. Clausen: (Reading)

(Note: The statement of Schmidt and Vincent here read into evidence had already been copied in this transcript as pages 44-47, and being read into the record without objection is not reproduced here to avoid duplication)

[fol. 246] Mr. Clausen: Your Honor, this time I will ask for stipulations concerning the status of the island of Guam. Guam, as I understand it, was ceded to the United States by Spain at the end of the Spanish-American War in the Treaty of Paris, and the United States therefore took it over on the 10th day of December, 1898, and so far as we are concerned in this case, the Civil Code of California was promulgated for the island of Guam on December 28, 1933, and then when the Japanese took Guam from us during World War II, of course, it was under Japan, but after we re-took Guam, the Guamese Code was reestablished, which incorporated and does incorporate the California Code, and that was done in 1944 after reoccupation by our United States Navy. The history and applicability of the Federal Tort Claims Act to accidents arising on Guam was the subject of a decision of this circuit, United States versus Johnson, reported in 181 Federal 2nd at 577, an opinion by Circuit Judge Pope, Your Honor. May that be stipulated, Mr. Scholz?

Mr. Scholz: I am pretty sure it is a correct statement. That is my recollection. In any event, let the Court take

judicial notice of the several treaties referred to in the opinion.

The Court: I do not think there is any question about jurisdiction, is there, counsel?

Mr. Scholz: Of course, under the Federal Tort Claims [fol. 247] Act a foreign country does not come within the jurisdiction of the Federal Tort Claims Act, but it is my opinion that a foreign country does not come within the purview of that situation. I do think probably the law of the place where the accident occurred would be the law that would govern this case.

Mr. Clausen: That is right, Your Honor, but as this decision holds, and as I have stated, the law of Guam is based and codified upon the California Code, and hence the Court points out, in United States against Johnson, the question of respondeat superior, an agency is governed by substantially California law.

The Court: What was the factual situation in the Pope case?

Mr. Clausen: In that case there was an accident. One Johnson sued the United States for personal injuries suffered when he was riding in a reconverted ambulance on the island of Guam being driven by a navy chief, pharmacist's mate. The ambulance overturned while the plaintiff was riding in it, and Judge Harris of this circuit gave judgment for the plantiff, from which the defendant appealed. The opinion by Judge Pope upholds the evidence warranted the trial court's finding that the driver was acting within the scope of his employment at the time of the accident.

The Court: Under the tort act?

Mr. Clausen: Yes, Your Honor. This is under the Federal Tort Act, and holds further that the adoption of the [fol. 248] Guam Civil Code was copied from the California Civil Code by the Naval Government of Guam, and that warranted the inference that the codified rules, such as that of respondeat superior, were intended to have significance and scope as previously given them by the California Supreme Court.

Your Honor, under that Federal Tort Claims Act, I would ask that if judgment is rendered for the plaintiff

that Your Honor include in the judgment the appropriate attorney's fees that Your Honor might consider proper as a part of the judgment, and in that connection I desire to be sworn and testify, if Your Honor desires, on the amount of attorney's fees, since Your Honor can award what Your Honor thinks—

The Court: When we come to that phase I will give you an opportunity if there is any question about it. There is a serious question on the law side of the case. I am in sympathy with your client, but I am frank to tell you that we have to have a record here to sustain your position. I say that advisedly.

Mr. Clausen: The plaintiff rests. The citation of the Murphy case is 179 Federal 2nd 743.

The Court: There is a *defending* opinion?

Mr. Clausen: Judge Bone, yes.

Mr. Scholz: If Your Honor please, I would like to call Your Honor's attention that in the deposition of Seabourn there is attached to that deposition a photostatic copy of the [fol. 249] driver's trip ticket and PM service record. I realize that ordinarily you would use this in argument, but as I recall, Your Honor would like to have things pointed out as we go along. This trip ticket has been testified to many times. The trip ticket attached to the deposition of Seabourn is made out to Cabrera, as has been testified to several times before, and the department is 374th maintenance, and the kind of work set forth on this trip ticket is "Official Business," and the request is by Lieutenant Werb, and it is signed "Nix, Dispatcher." It gives the trip or load record: Motor pool, base supply, warehouse No. 1, 374th Maintenance, service stock, hangar No. 6, 376th Supply, Headquarters Base Squadron, and the space that is filled out under the speedometer reading for these various places is the first one, motor pool, 7041. I think that is very important in this case, and I want to call Your Honor's attention to it. Of course, I can argue that later.

MOTION FOR JUDGMENT FOR DEFENDANT AND DENIAL THEREOF

Also I think I am familiar enough with Your Honor's procedure to know Your Honor does not want to make any ruling until all the evidence is presented to the Court. But

I would like at this time to make a motion for Judgment for the defendant upon the ground that the plaintiff has not proved a cause of action against the United States, and by stipulation, with the approval of the Court, I can argue that at the conclusion, when we have presented all our evidence, [fol. 250] if that is agreeable to the Court, but I want to preserve my rights because this in my opinion is a very important case, because the Murphy case is very broad in its decision. In my personal opinion it is too broad. However, it can be distinguished in my opinion. It could well be that this case might go up to the Circuit Court and from the Circuit Court possibly go up to the Supreme Court, because I still think that the United States Attorney's office would want to take it up, and I think the Court should be fully advised in this matter before making a decision.

The Court: I never make any mistakes, so I am not bothered about that. I take this case like all the others and do the best I can under difficulties.

Mr. Scholz: May I reserve my motion?

The Court: You can make your motion and I will deny it for the purposes of the record, and point out, so counsel will be advised, he may be able to strengthen his record in some particulars.

Mr. Scholz: The motion of the government that the plaintiff has not proven a case under the Federal Tort Claim Act is based upon several things: first, they have not proved, which is the heart of the Tort Claims Act, that this accident was caused by a person in the course and scope of his employment, and as a part of that particular point, they have not identified Seabourn with the actual accident, which is [fol. 251] particularly important, but they have in the testimony they have offered here shown that Seabourn was on pass and he just took off, as he stated in his deposition and his statement, he just took off, went around to various places on the island of Guam, drank beer, possibly champagne and other mixed drinks, and he came back and secured a trip ticket, which was not made out for him, and which was for official use, and using that trip ticket, which was not in his department either, it was in another department, he procured a government vehicle from the dispatcher, and with two companions who are innocent and knew nothing of the procedure under which he obtained it,

went to various other places and continued his drinking. Thereafter he became somewhat intoxicated, the other two left, and then he continued—where, no one knows. That certainly was not on business of the government in any respect. It is conceded that if a vehicle is properly assigned for recreation purposes, it is under the control of an officer or under some control, and the driver of that vehicle which is transporting people for recreation purposes is at fault in order that he may come under the Federal Tort Claims Act, and here there was no such thing. He simply procured the vehicle which was assigned to someone else and went on on his own business. Certainly it is not recreation to go out and take a vehicle that is not assigned to you, go out, get intoxicated, and end up no one knows where.

[fol. 252] Furthermore, under the army procedure and under the maintenance detachment such as this vehicle is in a motor pool, which is a group of vehicles for the purpose of supplying motor transportation to the various members on official duty, and it is possible that he could take a trip ticket and get that vehicle from the motor pool, but that is because that particular vehicle was on duty, if I can put it that way, 24 hours a day. It is for the use of personnel, because they may have to go out for the maintenance of the place or anything else any time of the day, and that was the use of that particular vehicle. I said they used it for 24 hours a day when it was used only on official business for the purpose of maintenance, and so forth, and that is why this trip driver made it only to official places which relate directly to the army. The evidence shows he was far removed, if he was the man that collided with the vehicle in which Miss Williams was riding—that he was far removed from any possible employment or direction of the army, and that is so stated in his own deposition, in his own testimony, that the trip ticket was issued for official business, and he said that he simply took off and went out on what he called his own personal recreation. That is the principal, and at this time the only reason for asking for a judgment for the plaintiff upon the grounds that the plaintiff is not part of a cause of action against the United States.

[fol. 253] The Court: At this time for the purpose of the record I will deny the motion.

Mr. Scholz: At this time, Your Honor, I have extracted from the investigation report of the army an affidavit of Pfc. Francisco R. Cabrera, who has been mentioned here several times, and I would like to offer this affidavit into evidence and read it into the record.

Mr. Clausen: I have no objection, provided counsel will identify the document as having come from the same army investigation file.

Mr. Scholz: The same investigation file that all this other data came from.

(The affidavit of Francisco R. Cabrera was thereupon received in evidence, marked Defendant's Exhibit G, and read.)

Mr. Scholz: If Your Honor please, so that we may have all the information on this case, I have extracted from the investigation file in this case a map of the part of the island of Guam, the pertinent parts here, and on that map has been marked in red arrows a course apparently taken by Sergeant Seabourn. I do not think this is good evidence of what is on there at all, and I do not offer it for that purpose, but merely for the purpose of facilitating the Court in checking the evidence heretofore presented. I am not sure whether it is going to help the defendant or help the plaintiff, but the marks on there can be disregarded, and simply for the purpose of the Court being able to follow the [fol. 254] testimony a little easier I offer that. Is that stipulated to, Mr. Clausen?

Mr. Clausen: I have not had time to study this, Mr. Scholz.

Mr. Scholz: Neither have I. I am not offering the red in there at all.

Mr. Clausen: In other words, you more or less wish it marked for identification. It is not evidentiary.

Mr. Scholz: I offer the map itself, but the red marks on there indicating any trip——

The Court: The record does not disclose at any time the course that they took in his ride, does it?

Mr. Clausen: The map does.

The Court: How can you introduce the map?

Mr. Scholz: Merely for the purpose of facilitating Your Honor's study of the case, and if there is any objection I will withdraw it.

Mr. Clausen: I have no objection to it being marked for identification, Your Honor.

The Court: Let it be marked for the purpose of identification.

(The map referred to was thereupon marked Defendant's Exhibit H for identification.)

Mr. Scholz: I have also extracted from the official file of the investigation the affidavit of Robert L. Stiles.

[fol. 255] The Court: Identify him for the purpose of the record.

Mr. Scholz: Stiles is a sergeant, headquarters, Base Service Squadron, detachment No. 1.

Mr. Clausen: Before you offer that I would like to introduce an objection.

Mr. Scholz: I am offering it.

Mr. Clausen: We object to that, Your Honor, on the grounds it would be hearsay, no foundation, and no opportunity of myself to cross-examine. This particular document contains a conclusion, and that apparently is the main reason counsel is offering it, in respect to what he conceives and believes to be the scope of some definitive aspects of what is or what is not official. I have no opportunity to cross-examine a piece of paper.

Mr. Scholz: If Your Honor please, Mr. Clausen has asked, and put in evidence, various parts of this investigation file, including the various affidavits of people he had no opportunity to cross-examine, and I believe under the law that the investigation file is still admissible in evidence. I do not think it lies within the mouth of Mr. Clausen to object to this when he has been using the same method throughout the rest of the case.

The Court: Did you object to his method?

Mr. Scholz: I did not object, if Your Honor please, because my understanding with Mr. Clausen was that any part of the investigation file, once it came from the investi-

[fol. 256] gation file, it would be admitted in evidence, and based upon that, of course, I have no objection.

The Court: It would be well for you to ponder about that for a moment. I am afraid if you made that offer in the

presence of Judge Fee, you would find yourself in jail, to say that a file of history can go into a case and avoid the rules of evidence is erroneous as can be, unless you persuade me to the contrary.

Mr. Scholz: Your Honor, I had the same case before Judge Carter in a case involving a child who was hurt at Fort Ord. He picked up a hand grenade and part of his leg was blown off. We argued that matter before Judge Carter. At that time I cited authority on which Judge Carter admitted the file in evidence.

The Court: I do not know what the circumstances were, but so we may have a proper record, identify this document and indicate for the purpose of the record the purpose of the offer.

Mr. Scholz: Sergeant Stiles was in charge of a certain detachment in which the vehicle involved in this case was a part, and there are several different detachments there in which much evidence has been introduced. The particular part of this affidavit I want to call particular attention to is a question that reads as follows:

[fol. 257] "What was the policy on the use of the vehicle? A. For official business only. The vehicle is on 24-hour dispatch and subject for night duty. Because of the nature of our work we are subject to call at all times and the vehicle is used officially by all men in the section who have permits. It is good on the post only."

The Court: It is good what?

Mr. Scholz: "It is good on the post only." Your Honor has admitted evidence where various people, not in this particular section, have testified to the use or custom or what other men in some other detachment or this detachment did. In view of that fact, and in view of the other evidence, which is part of the investigation file—it is a sworn statement of his—the weight Your Honor gives to it is another question, but in that view, and also in view of the testimony introduced by the plaintiff here, this is admissible.

The Court: He challenges it here. Under what circumstances was it taken?

Mr. Scholz: This affidavit was taken in the course of an

investigation by a duly appointed claims officer of the army in Guam following this accident, and this affidavit is part of the file, and it is an investigation from which almost all these other papers in the file have been introduced in evidence, and it being a part of the official investigation, under [fol. 258] two cases——

The Court: I am going to give you an opportunity to persuade me that this is similar to the instance before Judge Carter. I think we get in a rut about files here and the admissibility of them. It may be I have allowed them because they were not challenged. It is challenged here. There is a legal objection, and I will give you an opportunity to get the cases and disabuse my mind of it. We will straighten ourselves out on this.

Mr. Scholz: At this time may I offer it for identification?

The Court: Let it be admitted for the purposes of identification.

(The affidavit referred to was thereupon marked Defendant's Exhibit L for identification.)

The Court: Do I make myself clear?

Mr. Clausen: You make it clear to me Your Honor. May I say, Your Honor, I have had no opportunity to see that document until just a few seconds ago. I have had no opportunity to see what counsel wants in the file. I would like the privilege, since counsel is appearing to extract from the file, during the recess after four today to look at the file. It might be I will withdraw my objection if I can put in other papers.

Mr. Scholz: I can't see any objection to counsel looking [fol. 259] at the file. After all, the purpose is to acquaint the Court with all the facts in this case. For one not having seen the file before, I do not know where you got all these papers you offered in evidence, not this particular file, but a file similar to it.

Mr. Clausen: I got a copy of Mr. Murphy's statement, the investigating officer's report, and the other documents brought in as one exhibit this morning. Those extracts, as I understand it, were given to the plaintiff and she handed them to me. That is how I got them, before this case came to trial. I had arranged to produce Mr. Muzzy here to give live testimony. Mr. Muzzy is now on the Atomic Energy

Commission building air fields in French Morocco. He is out of this jurisdiction. Therefore before the case came to trial I asked Mr. Scholz to stipulate, if he would, that I might use the statement of Mr. Murphy, which I had, and which of course we might assume came from such a file. Mr. Scholz very graciously said he would. That was the sum and substance of our understanding. I repeat what I said a moment ago. If I see this——

The Court: I will issue an order in that respect. You may see the file.

Mr. Clausen: Thank you, Your Honor.

The Court: If we follow the trial procedure here, all documents are supposed to be laid out. The day of shadowboxing in court is at an end. Any testimony you offer is to [fol. 260] be known by the other side, if I follow this pretrial conference. Did I make myself clear, Mr. Scholz?

Mr. Scholz: Yes, Your Honor. Not only that, but I agree with Your Honor and I have no objection, and I have never had any objection to Mr. Clausen seeing the file. I assumed from his knowledge of the case that he had seen the file before.

The Court: What other testimony do you have in the case?

Mr. Scholz: I think that is just about it.

The Court: I will put this case over until two o'clock tomorrow, since I have a funeral to attend in the morning, and I suggest that you assemble those cases that you can depend upon so you will be in a position to present the matter tomorrow afternoon. Is that clear?

Mr. Scholz: Yes, Your Honor. I have a brief due. I have not had a chance to check it. I have dictated it but I have not had a chance to check it. Would Your Honor mind calling the case at three o'clock?

The Court: I will call it the following morning at ten if you wish.

Mr. Scholz: Yes, Your Honor. That will be the morning of the 21st.

The Court: Yes, that will give you a full opportunity then.

(Thereupon an adjournment was taken until February 21, 1952 at 10:00 a.m.)

[fol. 261] MORNING SESSION, FEBRUARY 21, 1952

The Clerk: Althea G. Williams versus the United States.

Mr. Scholz: Ready, Your Honor.

Mr. Clausen: Ready, Your Honor.

Mr. Scholz: Your Honor, after the conclusion of the last session we offered an affidavit here which was secured from the official investigation made by the United States Army and was contained in the file of that investigation.

At that time Your Honor requested that we furnish you with authority that would admit the investigation file in evidence. We pointed out that part of that file had already been offered by the plaintiff and that we felt that inasmuch as parts of it were offered the whole should be offered on the ground that if you offer a part of a letter in evidence you would certainly have the right to offer all the letter in evidence; if you offer part of a file in evidence you have a right to offer all of it in evidence. We had the same matter before Judge Carter, as I stated, and at that time we sent a letter to Judge Carter because he didn't know himself whether that would be admissible. We wrote him and said as follows:

> "The files may be helpful in determining whether or not the official contemporaneous reports and communications of public officers made in the line of their [fol 262] duty before the controversy between the parties began are admissible."

And we quoted 65 Corpus Juris 1426, citing Gordon versus United States, Court of Claims 292; also the case of Cohn versus United States, 258 Federal; the case of Chesapeake. etc. versus United States, 250 United States, 123.

In view of the fact that probably it would be consistent with our arrangement, instead of offering that additional portion of the report of the Claims Officer, or the report of the investigation made therein, at this time, if Your Honor please, we will offer the entire remaining file of this official investigation, the other parts having heretofore been offered and received in evidence.

Mr. Clausen: To which we will object on the same grounds

that we objected before. I would like to cite to Your Honor again the soundness of our position by saying that I can't cross-examine this paper. It would be hearsay and no foundation was properly laid, purely a conclusion expressed in this answer of a witness. It was nonresponsive and there was no showing that this particular noncommissioned officer knew what he was talking about. It is unfair to a plaintiff suing the United States to attempt to change testimony such as is set forth in those depositions of Seaburn, Schmidt and Vincent by a statement contained in a file. Now, why is it? In the first place, Your Honor, I was given notice that these depositions were to be taken. I then proposed my cross-interrogatories in the usual [fol. 263] fashion, and those cross interrogatories, in my opinion, developed the facts here and they would show a clear case, in light of the applicable law, in favor of the plaintiff. Now what counsel is attempting to do, Your Honor, is to take something which I didn't know of until just the other day and put it into evidence as such. Obviously it is wrong. I subpoenaed a major, Your Honor, to appear before Your Honor in this court room. Instead of communicating with me he communicates with the United States Attorney. I wanted the major down here this morning. I asked my son, who has just been admitted to the bar, to please arrange to have the major here. My son tells me this morning that the major says he is not coming, his colonel won't let him come. I am supposed to write to the Adjustant General at Washington. Now, Your Honor, I used to be in the office of the Judge Advocate General in Washington during the war and I used to facilitate——

The Court: They are important people as you know. We have a colonel here. You know how important he is.

Mr. Clausen: I guess he outranks me. I was only a lieutenant colonel.

Here is the situation. I think, Your Honor, if the United States is going to defend these cases they ought to bring live witnesses. I think we ought to have them here.

The Court: If they are available they will be brought in as far as this court is concerned.

[fol. 264] Mr. Clausen: I think Seaburn should be here, the man who is——

The Court: I agree with you up to this point. Counsel has indicated that you have used this material yourself.

Mr. Clausen: Judge, I did not use anything concerning this particular witness.

The Court: He made a statement you did. Is he misleading the Court?

Mr. Clausen: No, Your Honor. I think what he said to the Court was that I used something from a file, and then he argues that the whole file should go in. That is wrong, Your Honor. What I did, Your Honor, was to communicate by letter with Mr. Scholz and ask him by letter, "Will you agree that the affidavit of Mr. Muzzey may be used in lieu of a deposition?" and he, by letter, replied yes, I may do that.

Now, that is the sum and substance. Then, Your Honor, when I was putting in the affidavit of Mr. Muzzy I also put in the affidavit of the man who drove the vehicle and the report of the man who investigated the accident. Those are the things I put in. Your Honor, the law that he cites is clear.

The Court: They are offered as what?

Mr. Clausen: He is offering a wholly different affidavit, an affidavit of a Sergeant Stiles, which affidavit I didn't see until the day before yesterday.

Mr. Scholz: May I interrupt? I think is an incorrect [fol. 265] statement inadvertently made. What I am offering here, Your Honor, is the full, complete report of investigation made prior to the commencement of this action.

The Court: Well, you can't do that.

Mr. Scholz: Under the law I think we can.

The Court: Show me your authority.

Mr. Scholz: I just quoted the authority.

The Court: I am satisfied you can't take a report and just throw it in without an opportunity to cross-examine witnesses.

Mr. Scholz: It is admissible in evidence. The Court may give what weight it wishes.

The Court: I think I can overcome this like I do most problems. I will allow him to read it in subject to a motion to strike, in the interest of time. In that way you

protect your legal position, if that is agreeable. If it isn't I will rule. You can take your choice.

Mr. Clausen: I will just make a note to be sure to move to strike it, Your Honor, at the proper time.

The Court: Very well.

Mr. Clausen: I will conform to Your Honor's practice.

Mr. Scholz: Counsel stated that the Government is trying to change the statements. That is not quite correct. The statements were offered by both the plaintiff and by the defendant, and they are the exact statements, a part of [fol. 266] which are in the deposition. As far as I could see there is no difference in their testimony at all. This simply extends it.

I also want to state that also under the law the Court will pursue as a presumption of law that the investigating officer and public officials do their duty which can be overcome by evidence if there is anything to the contrary.

The Court: You can't take anybody's report and just introduce it in evidence here. Do you suppose I am to accept such testimony as that and make a determination on the merits of this case regardless of what any case may have said or whatever the case is that you have? They are subject to cross-examination, particularly if they are available.

Mr. Scholz: Well, I don't think they are available or we would have——

The Court: No, you stipulated that two of these affidavits were not in. It doesn't follow that because you stipulated to that the Court is bound by the third one.

Mr. Scholz: It is just my duty to present to Your Honor the facts as I see them. Your Honor has often remarked that I am wrong. That may well be. But this time I am pretty sure of my position or otherwise I wouldn't urge it so consistently.

The Court: In any event I will give him a record on it.

Mr. Scholz: This is the affidavit of Joseph L. Stiles, sergeant, AF18243964, Headquarters Base Service Squadron, Detachment No. 1 APO 264.

[fol. 267] AFFIDAVIT OF JOSEPH L. STILES

Mr. Scholz: I will skip being duly sworn. This is on the date of the 18th of March, 1949:

"Q. Sgt., are you familiar with the accident which is alleged to have occurred 3 March 1949 involving 374th TCW Weapons Carrier USA #2278365-S?

"A. All I know about it is that I gave the trip ticket over to Cpl. Seabourn.

"Q. Were you in charge of the vehicle?

"A. No, not at that time. I had driven the men to chow that night and had the trip ticket when Seaburn asked for it.

"Q. What time did he ask for it?

"A. Approximately between seven and seven-thirty, 3 March 1949. I was in my barracks playing cards and he came and ask for the trip ticket. He said he would return about 9:30. To the best of my knowledge, he did not seem intoxicated to me.

"Q. How did you come to that conclusion?

"A. I looked up at him and he appeared sober. I wouldn't have given him the trip ticket if he was drunk.

"Q. Can you definitely state that he was sober?

"A. He appeared to be sober.

"Q. What was the policy on use of the vehicle?

[fol. 268] "A. For official business only; the vehicle is on 24 hour dispatch and is subject for night duty. Because of the nature of our work we are subject to call at all times and the vehicle is used officially by all men in the section who have permits. It is good on the post only."

Now, the rest of it, Your Honor, I don't think is material unless Your Honor wants me to read it or counsel wants me to read it.

(Mr. Clausen looking at document.)

Mr. Scholz: If there is any question I will read it in.

"Q. Then you thought nothing of Cpl. Seabourn's request for the vehicle?

"A. No, as he and all of us sometimes work at night.

"Q. Who was the dispatch made out to?

"A. At that time, I think it was Pfc. Cabrera. Generally the first man who goes to the motor pool for the vehicle in the morning gets the trip ticket in his name.

"Q. How many vehicles are assigned to Tech Supply Section?

"A. Two. Lt. Werb's vehicle and the Weapons Carrier.

"Q. How many men in the section have occasion during the performance of their duties to use the [fol. 269] Weapons Carrier?

"A. Four, at that time. We now have three additional licensed drivers.

"Q. Were you sober when you were playing cards and gave Cpl. Seabourn the trip ticket?

"A. Yes.

"Q. Did he state where he was going?

"A. No.

"Q. Is there anything else you wish to state?

"A. Since the accident, I was put in charge of the vehicle. No one uses the vehicle without my permission.

"Q. Did Seabourn state to you that he was in an accident with the vehicle on 3 March 1949?

"A. No, he said he didn't remember being in an accident."

Signed and sworn to—signed by Sergeant Stiles and sworn to before Woodrow W. Jay.

Mr. Clausen: We will strike it all on the grounds I made already in objecting to the introduction of the document in evidence.

The Court: Objection overruled.

Mr. Scholz: At this time, Your Honor, if it will be consistent, I will offer the rest of the report of the investigation.

[fol. 270] Mr. Clausen: To which we object on the same grounds. May I state to Your Honor that there is no jury. I read this over as I was given an opportunity by Your Honor's order the day before yesterday.

Mr. Scholz: Which was unnecessary.

Mr. Clausen: Some things in there are favorable to me.

There are some conclusions throughout. For example, one thing favorable is that they assessed against Seabourn the cost of repairs and made him pay the cost of repairs of the vehicle that he ran into that night, which is contrary to his own statement. I would like that in. But I am not going to ask Your Honor to take that kind of evidence.

The Court: Will you pass that document up to me, please?

(Mr. Scholz handing document to the Court.)

The Court: The report of Claims Officer. Is that what this is?

Mr. Scholz: Yes, Your Honor. That is one of the documents. It is the investigating officer's file.

The Court: You show me your authority for this.

Mr. Scholz: I could only cite those cases again.

The Court: Well, you go and get the cases. I am tired of this sort of procedure. I guess we will take a recess until Colonel Scholz gets his authorities.

(A short recess was taken.)

The Clerk: The Court is now in session.

[fol. 271] Mr. Scholz: If Your Honor please, may I first cite the case of Gordon versus the United States, Sixth Court of Claims, 292. It goes back to about 75 years' history.

The Court: A Supreme Court case, is it?

Mr. Scholz: 1871.

The Court: A Supreme Court case?

Mr. Scholz: It is a Court of Claims case. I just cite that for the particular reason to show this is not an entirely new document and I think it is particularly in point.

Now, I might quote just from the syllabus.

> "The official contemporaneous reports and communications of public officers made in the line of their duty, before the controversy began, are admissible in evidence. And the communication of a first sergeant or a troop of cavalry to the commanding officer at Savannah, made immediately after the capture of that city, showing that a resident had concealed and aided a United States soldier who had escaped from the

Rebel prisons, and the communication of the command ing officer of the Chief Quartermaster of the Army o the same subject, are, in effect, official reports, whic may be put into evidence for what they may be wort as proof tending to establish a party's loyalty."

[fol. 272] Then, to bring it a little bit more down to date I cite from 65 Corpus Juris, page 1425. This is under subtitle of "Admissibility".

"The rules governing the admissibility of evidenc in civil actions ordinarily apply to actions by an against the United States. Thus the general rules ar ordinarily followed in determining the admissibilit of documentary evidence, and as in other cases, th evidence must be relevant. However, Congress ha passed many Acts relating to the admissibility of evi dence to prove certain facts, in which case, of cours the admissibility of evidence adduced in support there must be decided in the light of acts applicable.

"The requirements of the Bowman Act that 'vouch ers, papers, proofs, and documents' be transmitted t the Court of Claims with the claim referred was no designed to change their rules of evidence as to thei admissibility; nor does the fact that a claimant manu factures irrelevant testimony, and presents it to Con gress, and Congress transmits it as a part of the cas to the Court of Claims, thereby making the irrelevan [fol. 273] matter relevant, and the Act providing tha in actions by the United States against individuals, n credits shall be allowed except such as have been pr sented to and disallowed by the Accounting Officers o the Treasury, requires that the claim only shall hav been presented, and not the evidence to support it, an hence, such evidence will not be excluded merely b cause it was never so presented."

This, I think, is the meat of it:

"The official contemporaneous reports and comm nications of public officers made in the line of their du before the controversy between the parties began a admissible, but not a report after the writer left th

government service, nor the report of a board of state officers. Where evidence cannot be procured by defendant, the court must exercise an unusual degree of circumspection and care in weighing such evidence as the claimant may offer."

And then, in the case cited of Cohn versus the United States, 258 Federal Reporter, 355, I will quote from the syllabus.

"Documents used as evidence in a Naval Court Martial, and required by statute to be transmitted to the [fol. 274] Navy Department and there kept on file for two years are 'official documents' while so kept."

In Section 1494 the Court stated:

"Authenticated copies of such documents are admissible in evidence equally with the originals, and unauthenticated copies are inadmissible as secondary evidence."

Then in the case of Chesapeake versus the United States, 250 US, page 123, and I only quote again from the syllabus:

"Books of the Treasury Department showing the miscellaneous receipts and disbursements of the Government printed from the written public records of the department, pursuant to the Acts of Congress and Article 1, paragraph 9 CL 7 of the Constitution, and used as original records in the daily business of the department and produced from its custody, held, competent evidence, without certification under the statute, paragraph 882, for the purpose of proving the nonpayment as well as the payment of debts by a private corporation to the United States."

Mr. Clausen: Replying to that, Your Honor, I wish to point out that if you take the sum and substance of the extent to which those authorities go it is this:

Before a controversy arose the documents which would be admissible in the State Court would be admissible here. That is the distinction. The document which counsel tries

[fol. 275] to introduce is after the event and purports to be a statement made in advance of the accident and obviously must be after the event. Therefore it is objectionable. I submit, Your Honor, the objection and the motion to strike on all the grounds that I stated.

Mr. Scholz: The documents, of course, were after the accident because it couldn't possibly pertain to it unless it was after the accident. It had to relate to it. It is like anything else. Any papers relating to something has to be drawn up after the thing occurs, and the controversy there means before suit is filed, I am pretty sure. At least that is my opinion. I don't think it makes a particular lot of difference whether it is offered in evidence or not because I think there is sufficient evidence already in the file to sustain the Government's contention that the driver Seabourn was not acting within the line of duty, or in the course or scope of his employment. But, however, I do think that the Court should be advised of all the evidence in the case. As counsel says, if it is in his favor, well, that is perfectly all right, it can go in in his favor.

The Court: Well, I will adhere to my previous ruling, namely, that I will let it go in subject to motion to strike and over your objection so we will have a record. You will not waive any of your legal rights.

Mr. Clausen: Thank you, Your Honor.

[fol. 276] Mr. Scholz: We will offer that in evidence.

The Clerk: Defendant's Exhibit I.

(Whereupon the document referred to was received in evidence and marked Defendant's Exhibit I.)

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Scholz: That is the Government's case, Your Honor.

The Court: Let me inquire in relation to this officer. Who requested his presence?

Mr. Clausen: I did. I subpoenaed him, Your Honor. Mr. Scholz now just stated that perhaps he would stipulate that the Army Regulations and the material that I intended to identify by the major might be done by stipulation.

Mr. Scholz: That is not exactly so. You correct me if I am wrong. I said I don't see what the officer could testify to because if he testified to Army Regulations the best evi-

dence of the Army Regulations would be the Regulations themselves. And I think the Court will take judicial notice of the Regulations. However, if there are any regulations they want produced by the plaintiff I will certainly stipulate to it. I mean, that would be the best evidence rather than some offer.

The Court: Where are they?

Mr. Scholz: Well, I have some of the regulations here. I have an extract of them.

Mr. Clausen: I was seeking to prove those I had in mind. I don't have them here. I can send my son out to the Presidio to get them.

[fol. 277] Mr. Scholz: Why not put in a little brief, just a brief on the law of the case and then the Court would have them in front of him.

The Court: But I don't want to have you leave this case without a full opportunity of producing any witness you want. That is all I have in mind.

Mr. Clausen: Perhaps the best thing to do would be to argue it orally, Your Honor, and then if the question came up if there is any doubt about the regulation, my right to——

The Court: What regulation have you here?

Mr. Scholz: Well, I have an extract from Army Regulations in my file.

Mr. Clausen: The army regulations I know well since I used to write them.

The Court: Well, that would be admitted in evidence and used by either side for any purpose they see fit.

Mr. Scholz: I think Your Honor will take judicial notice of the army regulations anyway. I think it would be the duty of both of us to call Your Honor's attention to the particular regulation that we think advisable the Court should know, and I submit that probably it would be a better way of doing that, to let Mr. Clausen and myself submit extracts of any army regulations, and particularly giving the regulation number to the Court so that the Court would have it.

The Court: I will take judicial knowledge of any regu-[fol. 278] lation that either side may present.

Mr. Clausen: And also, Your Honor, there are bulletins of the Judge Advocate General which are also susceptible to judicial knowledge, in my opinion. As a matter of fact, in the Murphy case the Court quoted from one. Now, these volumes we have here on counsel's table, comprising some eight or nine volumes are available, and they are borrowed from the San Francisco law library.

The Court: Either side may use them.

Mr. Scholz: I think they are admissible. Of course, the weight of it would depend on the Court.

The Court: Well, the Court will not be advised until they are produced.

Mr. Scholz: That's right.

The Court: Just so they may be available at any time, or produce them now or whenever you wish. I will take judicial knowledge of it.

Mr. Clausen: When should I renew my motion to strike, Your Honor, with respect to the statement of Sergeant Stiles?

The Court: When the case is submitted.

Mr. Clausen: All right, Your Honor. In other words, it is in accordance with Your Honor's practice that it is deemed I have moved to strike?

The Court: Yes. The record so discloses. At any time before the record is made up. Even after judgment is rendered. So you will not lose any of your legal rights.

[fol. 279] Mr. Clausen: All right, Your Honor. I have just one question I will ask the plaintiff.

If you will step forward, please Mrs. Williams.

The Court: Althea Williams. She has been sworn.

Mr. Clausen: You have already been sworn.

Althea Williams, the plaintiff, recalled to the witness stand, previously sworn.

Redirect examination.

Mr. Clausen:

Q. At the time of the accident when you looked out, as you testified the other day, and you saw the driver of the weapons carrier which ran into you, are you able to tell

the Court anything concerning his appearance as to whether he was dressed in any particular type of clothing?

A. I could describe him.

Q. Please do so as nearly as you can.

A. Well, he wasn't a short man. He was a well built man, and as I—I just saw the side of his face, and he was a young man. He had a good jaw bone, but he was not heavy. He had on a soldier's cap and uniform, and he just sort of stood, and then he rather clumsily ran off the side of the coral.

Mr. Clausen: That is all.

Recross-examination.

Mr. Scholz:

Q. Mrs. Williams, you said that he had a good jaw bone.
[fol. 280] A. Pardon?

Q. You stated just now that he had a good jaw bone?

A. Well, it looked—I just saw him three quarters, and I know I saw that part of him. I don't know. It might not be a good jaw bone, but I remember seeing the jaw.

Q. You recollect particularly that he had a good jaw bone, as you state?

A. Well, let's see. Right through here he was very solid looking (indicating). I just remember his flesh.

Q. When you saw him was his back turned to you or sideways?

A. Well, now, I saw him through this window and he was—I could show you how to stand. I mean, if—I saw just this part of him, just sort of three quarter profile (indicating), and his back was sort of not quite three quarters. He turned around and faced us and sort of—you know how you glance over your shoulder just like that (demonstrating), And then he just ran off down the side.

Q. Was that immediately after the collision?

A. Well, I don't know when he got out, but I do know——

Q. How soon after the collision did you see him?

A. After I came to.

Q. Well, how soon was that?

A. It seemed an eternity.

Q. You don't know?

[fol. 281] A. No.

Q. Were you unconscious at that time?

A. Well, Mr. Muzzy and he both agreed I blacked out.

Q. Well now, not what anyone else agrees because I think the file shows otherwise. But I am just asking you what you know of your own knowledge. Do you state now you were unconscious for part of the time?

A. I am positive I blacked out. I am positive when I came to I couldn't feel——

Q. You are positive you were knocked out and you don't know how long you were knocked out?

A. As I say, then——

Q. Not what they say. You can't testify to what other people say. You are the only one that can give this testimony. We are only asking you.

A. To me it seemed as eternity.

Q. Pardon?

A. I said to me it seemed an eternity.

Q. I didn't quite hear you.

A. My goodness! I said, to me it seemed an eternity.

Mr. Scholz: That's all.

Redirect examination.

Mr. Clausen:

Q. The important thing, Mrs. Williams, is that my question was directed as to whether you observed his clothing. Now, state what you did observe.

[fol. 282] Mr. Scholz: I object to the question upon the grounds it has been asked and answered. She testified two or three times.

Mr. Clausen: All right.

Q. You are clear that you recall the manner in which he was dressed?

A. He was dressed like all the enlisted soldiers that I talked to, khaki uniform.

Recross-examination.

Mr. Scholz:

Q. Now, all the people over there are dressed the same way, are they not? Even the civilian employees, they all wear khaki clothes, isn't that a fact?

A. No.

Q. Well, most of them, then?

A. The Army wears a different uniform.

Q. Would you state as a fact that the civilian employees don't wear khaki trousers over there?

A. I will state as a fact they don't wear uniforms.

Q. I am asking you——

(Last question read by the reporter.)

A. "Trousers" are different than "uniform", Mr. Scholz. The man had on a khaki shirt and khaki trousers. He was completely khaki.

Q. Will you please answer my question again?

(Question read by the reporter.)

[fol. 283] A. Sure, they wear khaki trousers, yes.

Q. Isn't it a fact that civilian employees also wear khaki cotton shirts over there?

A. It is against rules and regulations.

Q. I am asking you.

A. I don't know. I have never noticed that any did.

Mr. Scholz: That is all.

Mr. Clausen: That is all, Your Honor.

We can argue to Your Honor now.

The Court: Whatever you gentlemen wish.

Mr. Scholz: I suggest maybe Your Honor may want a short brief on it, and then if Your Honor desires our argument following the briefs we can give that. Or if Your Honor doesn't—whatever the Court wants.

The Court: Whatever you wish.

Mr. Clausen: I have the books here this morning, Your Honor, that we have obtained. I would just as soon argue the matter now orally and then on brief, if Your Honor wishes.

The Court: All right.

(Thereupon Mr. Clausen presented his argument to the Court.)

Mr. Clausen: I have some bulletins of the Judge Advocate General my son has prepared. If Your Honor would be so kind as to listen to him——

The Court: We will give him a chance this afternoon. [fol. 284] Mr. Scholz will have a couple of hours to prepare.

(Thereupon an adjournment was taken until 2:00 P.M. this date, after which the matter was argued to the Court.)

Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 285] (Excerpt from the Argument of Mr. Scholz, Attorney for the United States of America.)

Mr. Scholz: Referring back to this accident now, from the evidence I do not know who was driving the car at the time of the accident. There is considerable presumption and inferences, and it may be sufficient for this Court to find that Seabourne was driving.

The Court: I may advise you at this time that from the standpoint of the record as it now stands, he was driving the car, and there is no other determination that I could make. I am only mentioning it so you may know the state of mind of the Court.

Mr. Scholz: I was about to get to that. I am not quarreling with that, as a matter of fact. The investigation found he was driving the car. I think there is sufficient presumption and inferences, if not testimony, to show that he was. He was out on a pass. He came back around 7.30—6.30 or 7.30 in the evening, and he got this car; and at that time he was feeling pretty well, as far as alcoholic contents are concerned. He picked up this car and he was driving on his own personal business. He started out that way, and I personally assume that he was driving at the time he hit. I am not concerned much with that. I never spent much time on it. The only possible point would be—and I [fol. 286] just call your Honor's attention to it—not that

that is the main point—the main point of the government's case is whether he was in the course and scope of his employment—but there might be contributory negligence on the part of the driver of the other vehicle in parking his car in the roadway where a person driving straight, as Miss Williams testified he was going straight down the road, would hit him, with no lights to light up the darkness of the scenery, to quote a poet.

Reporter's Certificate to foregoing transcript omitted in printing.

[File endorsement omitted.]

[fol. 287] Minute entry of argument and submission—July 26, 1954. (Omitted in printing.)

[fol. 288] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—September 8, 1954

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[fol. 289] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13,707

ALTHEA G. WILLIAMS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

OPINION—Filed September 8, 1954

Appeal from the United States District Court for the Northern District of California, Southern Division

Before Mathews, Bone and Chambers, Circuit Judges

BONE, Circuit Judge:

This is an appeal from a judgment denying relief in an action under the Federal Tort Claims Act, herein "the Act." The decision of the lower court is reported in 105 Fed. Supp. 208.

At all times here pertinent appellant was a civilian employed as a teacher by the Army Air Force, and also as a secretary by a private construction firm operating on the Island of Guam. She was injured on the night of March 3, 1949, at or about 10:30 p.m. while sitting in a vehicle then parked on a "turnabout" place located on the end of what was called the Crystal Breakwater, this being an area on the Island reserved for "parking" purposes, and a place where cars were customarily parked.

At the time above mentioned an army vehicle then being driven by one Seabourn (a clerk in the Supply Department of the United States Army based on the Island) crashed his vehicle into the side of appellant's car, causing the physical injuries upon which this action was based. There was overwhelming evidence that Seabourn was drunk at the time.

[fol. 290] Pertinent provisions of the Act, Title 28 U.S.C.A., read as follows:

§ 1346:

"(b) * * * the district courts * * * shall have * * * jurisdiction of civil actions on claims against the United States, for money damages * * * for * * * personal in-

jury * * * caused by the negligent * * *act * * * of any employee of the Government while acting within the scope of his office or employment, under circumstances where * * * a private person, would be liable to the claimant in accordance with *the law of the place* where the act * * * occurred." (Emphasis ours.)

§ 2671: " 'Acting within the scope of his office or employment,' in the case of a member of the military or naval forces of the United States, *means acting in line of duty.*" (Emphasis ours.)

§ 2674: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

The Question Presented

Whether the United States is liable, under the terms of the Act (above quoted) for the negligent acts of a soldier which occur when the soldier is seeking personal recreation during the period he is off duty and away from his army base on a pass.

Relevant and applicable provisions of the Civil Code of Guam and Army Regulations are set forth in the margin.[1]

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[1] Section 2338 of the Civil Code of Guam provides as follows:

"2338. Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his wilfull omission to fulfill the obligations of the principal."

Army Regulations 700-105 (30 June, 1948) provide in pertinent part as follows:

"26. Use of vehicles.—* * *

b. Motor vehicles * * * will be operated * * * only if properly dispatched on WD Form 48 (Driver's Trip Ticket and Preventive Maintenance Service Record), issued by the dispatching motor pool or under such instructions as the ap-

[fol. 291] The Facts

There was credible and competent evidence of a convincing character from which the trial court could have inferred and concluded that the facts which we here summarize were fully established as true.

Seabourn obtained an appropriate pass to leave the army base on and for the day of March 3, 1949. Accompanied by two other soldiers (Schmidt and Vincent) he spent the afternoon drinking beer. The three men returned to the base about 7 P.M. and while there, a Sergeant Stiles, a member of Seabourn's company, gave Seabourn a so-called "trip ticket" for a ¾ ton vehicle known as a "weapons carrier." This ticket had been made out about 8 A.M. that morning

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propriate commander under existing authority may direct.

c. Motor vehicles will be used only for official business, including the special uses listed in paragraph 28.

* * * * * * *

28. Special uses.—Motor vehicles, when available without detriment to other official business * * * may be used by special direction of the commanding officer for the following purposes:

* * * * * * *

a. Authorized athletics.

b. Transporting personnel, including entertainers and party guests and supplies and equipment in connection with authorized, organized, and supervised recreational, welfare, and morale-building activities.

* * * * * * *

29. Motor pools.—* * *

d. Vehicles will be dispatched from pools to perform specific tasks, and will not be permanently allocated or assigned to any agency or individual, except as prescribed herein."

Section 2338 of the Guam Code follows the language of a comparable section in the California Code, thereby adopting for Guam the rule of respondeat superior in force in California. It is thus "the law of the place," i.e., Guam. rectly.

to a driver named Cabera,* a soldier who also worked with Seabourn, and it discloses that the vehicle had been requested by a Lt. W. R. Werb, and use of the vehicle was therein authorized for "Official Business." Listed on the ticket are the various official points to which the weapons carrier was driven that day.[2] Neither Seabourn's nor Stiles'

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* The driver's name is indicated in the text of the trip ticket as Cabrera. However, the ticket was signed by Cabera, who is obviously (there) spelling his name cor-

[2] "DRIVERS TRIP TICKET AND P. M. SERVICE RECORD 2272365

Drivers Name
Cabrera*
Date 3-3-49
Report to
Lt. Werb
Time out
0810
Organization
DMP
Time in
1500
DEPARTMENT OR ADDRESS
374th Maintenance
KIND OF WORK OR ROUTE
Official Business
REQUESTED BY Orgn, or individual
Lt. Werb
/s/ Nix
Dispatchers signature
HOUR METER
SPEEDOMETER

IN	OUT	Total miles	in	out	Total hours
7129	7041	88	0310	0810	24

fuel added
10 gals
Oil added
0

I have performed the "preventive maintenance service of this form and recorded all deficiencies and any accident

/s/ Cabera*
Drivers signature

I have noted all entries on this form and taken necessary action
TRIP OR LOAD RECORD
PASSENGERS OR WEIGHT
SPEEDOMETER OR HOUR
7041
FROM
Motor Pool
TO
Base Supply
TO
Warehouse 1
TO
374 Maintenance
To Service Stock
To Hangar 6
To 376th Supply
To Hq Base Squadron
Vehicle released at 0315-7129
Official User (signature and grade)
/s/ William R. Werb, Jr. 1st Lt. USAF"

CERTIFIED A TRUE COPY
WOODROW W. JAY
Civilian Official in lieu
of Claims Officer Guam
District, Corps of Engineers
Exhibit L Report of Claims
Officer U.S.A. No. 2362773
5 April 49

[fol. 292] name appears on the ticket, nor was Seabourn's use of the vehicle in any way indicated thereon.

[fol. 293] By means of this "ticket," Seabourn secured possession of the vehicle and in company with the two men named drove to the Enlisted Men's Club on the Island where they drank more beer as well as some champagne, and then they decided to "go for a ride." Thereafter, and prior to the accident here involved, Seabourn let his companions out of the vehicle and drove off alone. These companions later swore that Seabourn was then "definitely drunk," and Seabourn himself swore that he remembered nothing further until the next morning when he awoke beside a road.

Seabourn's use of the vehicle while thus "off duty" and in quest of entertainment, was not a use in furtherance of any prescribed or indicated military duty. The vehicle was not being used in Seabourn's "off duty" period to serve any prescribed or noted military purpose or interest of the government, nor was Seabourn's use motivated by such a purpose. His superior military authorities had no knowledge of, or supervision over, the use of the vehicle while it was in Seabourn's possession, nor any control over Seabourn after he had secured it from Stiles by using the Cabera ticket which had been previously issued by Lt. Werb (see footnote 2). Nor was any military order issued by a superior officer directing or authorizing Seabourn to use the vehicle for *any purpose*, military or otherwise (including "recreation"), or for the execution of any military order.

The facts as we have outlined above are fully reflected in the record before us.

On the material issues in this case the lower court found that the accident occurred on the date, at the place and under the conditions we have noted above; that Seabourn was a corporal in the United States Army stationed on the Island of Guam and assigned to Headquarters Base Service; that he was off duty and away from the base on a pass at the time; that he and two associates spent the afternoon of the day in question drinking beer and the three men returned to the army base about 7 P.M. of the day in question where Seabourn obtained unauthorized possession of the vehicle he used, after which Seabourn, accompanied by

his two companions, Vincent and Schmidt, drove the vehicle to the Enlisted Men's Club on the Island where they indulged in champagne as well as beer, after which they decided "to take a ride"; that some time prior to the acci- [fol. 294] dent Seabourn let both of these companions out of the vehicle, and that is all Seabourn remembered until the morning following the accident, when he awoke beside the road; that the bodily injuries of plaintiff resulted from the accident which was entirely due to the negligence of Seabourn; that Seabourn's use of the weapons carrier was not for the purpose of transporting United States Army personnel under the direction of his commanding officer, nor for any purpose authorized by army regulations; that Seabourn was on a frolic of his own and used the vehicle as he might use his private automobile in seeking personal entertainment.

On these findings the court entered conclusions of law setting forth that Seabourn, an employee of the defendant, was not acting within the course and scope of his employment and that plaintiff is not entitled to recover from the United States, and the respective parties should each bear their own costs.

Judgment was thereupon entered in favor of the Government.

Specification of Errors

It is sufficient to say that appellant's specifications of error not only challenge all of the findings and conclusions of the lower court which are material to the issues posed on this appeal, but also the failure of the lower court to make certain proposed findings and conclusions tendered by appellant which reflect her theory of federal liability for Seabourn's tort.

Appellant's Position

We summarize what appears to us to be the substance of appellant's contentions on this appeal:

She urges that despite the court's findings, the fact remains that Seabourn was seeking "entertainment"; that such a "diversion" is essential to a soldier's "morale," and as a (legal) consequence, his late joy ride in the army vehicle was within his "scope of employment." Relying on this

theory, she sees a perfect analogy between the facts of th
instant case and those discussed in our opinion in Murphe
v. United States, 179 F. 2d 743, and she also assures us th
the case before us narrows to a consideration of only tw
[fol. 295] points which are determinative here, these bein
the facts, and this Court's views as expressed by the majo
ity in the Murphey case.

Appellant frankly states that she is content to "rest h
case" on the Murphey decision, and accompanies this co
cession with a lengthy discussion of the holding in that cas

We disagree with appellant's contention that our decisio
in Murphey v. United States, supra, when laid off again
the facts revealed by the record before us, is dispositive
the vital and controlling issue in the instant case. We a
fully persuaded that the Murphey case is clearly disti
guishable on the facts. There we pointed out that Sergea
Brander drove an army truck to the town of Klamat
under *specific authorization* of his commanding officer. H
was authorized to take it into the town "for pleasure,
under instructions that it might be used to carry som
soldiers into the town "for entertainment, movies, etc.
The majority of this Court thought that the official permi
sion thus granted was broad enough to *include* a visit to a
Indian dance (certainly in itself a harmless diversion) bein
held only a short distance outside the town, this becaus
Brander's "digression" to the place of the dance was wit
"knowledge of [his] superior officers." The basic assump
tion on our part was that attending the dance was withi
the concept of allowable "recreation" *because* it was fo
"entertainment, movies, etc." Brander's commanding of
ficer testified that "it was supposed that the truck would b
parked alongside a building in the town until it was to be re
turned to the army camp."

Brander was negligent in his driving but it was not con
tended that he was drunk at the time, or that drinking con
tributed in any way to his negligence.

The accent in the Murphy opinion is on *recreational us*
of the army vehicle for "improvement of Brander's mor
ale" and the majority of the court found support for thi
interpretation of "recreation" in an opinion of the Judg
Advocate General that "engaging in *allowed athletic ex*
ercise" is within a soldier's "line of duty." Then we pro

ceeded to find a suitable analogy in an Admiralty case holding that in seeking allowed recreation, a seaman "was in the course of his maritime employment" when after going [fol. 296] ashore, *he injured himself* while diving into a shallow swimming pool. No cases in the field of Admiralty are cited (and probably not one could be found) which support the view that a ship could be held legally liable in damages to a civilian who was the victim of a wholly independent tort committed against his person by a sailor while the latter was "recreating" ashore on leave from his ship.

As the Admiralty case we cited points out, shore leave for a seaman is an old part of the business of sailing ships. The present day *status* of a sailor has also preserved his traditional right (as a ward of admiralty) to "cure and maintenance." Even this ancient right is lost when his voluntary misdeed is the active cause of his physical disability or sickness. And certainly the historical legal status of a sailor is far removed from the military status of a soldier.

In the Murphey case we carefully delimited the area of federal liability by the frank and illuminating statement that:

"This case concerns specifically allowed amusements, here 'movies, etc.' in the town of Klamath, *We are not holding that in any case where a soldier is on a frolic of his own he can make the government liable simply because he there found entertainment.*

"We think the *overriding purpose* in Brander's employment in the use of the truck in the town of Klamath *is the improvement of the morale of the soldiers in seeking 'entertainment.'* The 'movies, etc.' certainly would include the Indian ceremonial. The government being liable as a private person in California, it is liable where the truck was in use for the broad purpose for which it was employed by Brander, even though he had instruction that he was not 'free' to use it in a particular manner accomplishing that purpose.

* * * * * * *

"Here Brander was seeking *the specified entertainment* which would *improve his military morale.* That he was 'directly or indirectly serving his master' in so doing is none

the less within the scope of that employment, because he was serving his own desire and that of the other sergeant seeking recreation in taking the latter's two lady friends to the ceremonial." (Emphasis ours)

[fol. 297] And we again emphasized the significance of such a holding in language used in United States v. Johnson, 181 F. 2d 577 relative to the conduct of a driver of a navy vehicle. We specifically referred to the *absence* of evidence showing that the driver was "on a frolic of his own" at the time of the accident there involved. There this Court considered the case of a civilian in Guam who was injured when a navy vehicle in which he was riding overturned. The driver of the vehicle was a navy pharmacist's mate. Our ultimate holding was that the doctrine of res ipsa loquitur was applicable, because the vehicle suddenly started to "shimmy" and quickly rolled off the road. Upon the assumption that this unexplained action of the vehicle (wholly within the control of the navy) spelled out careless inspection or construction (careless or "drunk driving" of the vehicle at the time was not evident) we applied the res ipsa loquitur doctrine and held the Government liable under the Act.

Under the facts in the Johnson case (also relied on by appellant) we also held that the driver was on official navy business at the time (and therefore "acting in line of duty") despite some "deviations" (for personal errands) from what would have been a normal time and route in delivering a navy report. We refused to accept the argument that these slight "deviations" indicated (in a legal sense) that the driver had (thereby) departed "on a frolic of his own." This case is also clearly distinguishable from the facts in the Murphey case and the facts in the case at bar.

Appellant also argues that in Murphey we held that an employer is held liable for "incidental" acts which he should reasonably have expected would be done though the particular act "be forbidden, or done in a forbidden manner," to which is added the assertion that this Court "emphasized that the superior officers knew that the truck was employed for such [forbidden] purposes," and that Brander's activity "directly or indirectly served the master," and were thus "within the scope of employment." We are reminded by appellant of our reference to the "paramount

significance of morale in military life," this *morale* to be achieved by *recreational activity*. And because *such activity* is authorized in Army Regulations, the employer is rendered responsible *under the Act* for the resultant negli- [fol. 298] gence of the employee, this by application of the respondeat superior doctrine to this case as this doctrine is applied under California law to the "master and servant" relationship in the field of private employment. This emphasis justifies comment since both parties stress the doctrine in their briefs because of its assumed bearing on the crucial issue before us.

The Respondeat Superior Doctrine

Appellant's stress is on decisions of the California state courts where it was applied in cases involving the ordinary "master and servant" relationship in purely private employment. In none of the California cases cited does a court discuss (as indeed it could not) the question of *federal liability* for the tortious acts of a soldier.

The *status* of a soldier or sailor in military or naval service is quite different from the *status* of either an employee serving a private employer or a civilian employee serving the United States, a fact which requires emphasis because of its importance in the case at bar.

The novel *status* of a soldier arising from his peculiar relationship with his Government, was clearly pointed up by emphatic language of the court in United States v. Standard Oil Co. of California, 332 U. S. 301, 305, 306, 309, 310. That decision merely brought into sharp focus the controlling legal and constitutional factors underlying such a unique relationship. Congress did not lose sight of this obvious fact while considering the many problems wrapped up in the national defense program in connection with its surrender of immunity to suit under the Act. As we point out herein, one important problem was met and disposed of by a specific provision in the Act which carefully delimited the area of federal liability for a tortious act of (as here) a soldier, by providing that such liability would attach *only* when the act was committed while the soldier was "acting in line of [military] duty." This careful delineation provides a clear line of demarcation between

Government liability for a soldier's torts and the area of general liability of a private employer for torts of his employees in classical "master and servant" cases where the rule of respondeat superior is normally applied.

[fol. 299] Comments of the court in Feres v. United States, 340 U.S. 135, 138, 141, 143, are pertinent as bearing on the peculiar status of a soldier. And see United States v. Sharpe, 189 F. 2d 239, 241, where the court indicates that when a question of statutory construction of federal legislation is involved, federal courts are not bound by local decisions but apply their own standards—this with respect to determining the relationship of the Government to its employees.

On the face the Tort Claims Act appears to be a general act designed to cover all sorts of claims against the United States for money damages for tortious injuries to persons and property caused by the negligent or wrongful act or omission of any Government employee "while acting within the scope of his office or employment."

At first blush, some broad preliminary language in the Act would seem to embrace *all categories* of Government employees and servants (even including members of the military and naval forces of the United States) and serve to bring them and the United States within the orbit of the orthodox respondeat superior doctrine as applied under "the law of the place" where the tortious act was committed. But this view of the meaning of the Act is completely dissipated by an inspection of its full terms. It would do violence to reason to assume that Congress did not recognize the fact that a vast number of purely *civilian employees* are on the Government payrolls, and one of its obvious purposes was to bring these employees within the orbit of the Act. While we are not here concerned with the tort of a civilian employee of the Government, the *status* of such an employee (under the Act) becomes a matter of importance when the question of federal liability for his tortious act is involved. A most casual reading of the Act will make this fact very plain, and in this connection it may be assumed that as to such civilian employees, the familiar doctrine of respondeat superior, as it has been applied under California law to the commonplace "master and servant" cases, would apply.

But in dealing with the problem of federal liability for tortious acts of *members of the military and naval forces* a wholly different situation is presented because Congress [fol. 300] saw fit to adopt a drastic modification of this "master and servant" doctrine. By carefully chosen language it delimited the area of federal liability for tortious acts of members of this group by specifically providing that so far as concerns such acts, the phrase "acting within the scope of his office or employment" shall *mean* "acting in line of duty." By use of such plain, unambiguous and highly significant language, Congress made abundantly plain that federal liability can arise *only* when the tortious act was committed at a time when the tort feasor member of our military or naval forces was actually "acting in line of duty." Unless we are prepared to utterly disregard this mandate and refuse to conform to its obvious meaning, we must (as we do in this case) hold that "acting in line of duty" means *acting in line of military duty.* If Seabourn was not acting in line of *military duty* at the time he injured appellant, the rule of respondeat superior (as applied in orthodox "master and servant" cases) loses its standardized force for that rule has been modified in the significant manner here noted. We need not stress the fact that when the sovereign waives its immunity from suit, it may, as here, do so *on its own terms.*

And as appellee points out, appellant cites no authority for the theory that a private employer could be held liable in damages for the tortious act of an employee occurring on an allowed "day off" while he is out driving on a joy ride while drunk.

In stating her position on the issues, appellant asserts that since (under Army Regulations) a soldier may indulge in "recreation," his "off duty" recreational activities are properly to be regarded as within the scope of his "military duty." The assumption necessarily underlying this contention is that Seabourn *was actually indulging in an authorized and permissible form of "recreation"* [3] at the

[3] We do not look to a dictionary definition of the word "recreation" as determinative, for the unchallenged Army Regulations must govern the meaning of the term since they define "recreational activities" in which army personnel may engage.

time he crashed his army vehicle into appellant's car. Upon no other basis can her position be sustained unless we close our eyes and agree that a loose post "practice" of "passing around" trip tickets issued only for *official use,* [fol. 301] (when the actual use is not for official business) in some undisclosed way transformed the use by Seabourn into an authorized "official use."

The loose operation of "passing around" among enlisted men "tickets" which would give them possession of an army vehicle for joy riding and drinking bouts, all without the knowledge or approval of their superior officers, finds no sanction in applicable Army Regulations, but to the contrary, is a clear violation of these rules.

A look at the regulations (footnote 1) will reveal that they refer only to authorized athletics, organized and supervised recreational welfare, and morale-building activities. Every recreational activity mentioned in the regulations is a far cry from a wild, reckless and wholly independent act of violence against a civilian, and we are unwilling to give sanction to appellant's basic theory that irresponsible drunkenness and irresponsible driving late at night on a "lark" or "frolic" in a wholly independent venture entirely unrelated to what we conceive to be "acting in line of duty," must be regarded by us as "recreational" conduct authorized by Army Regulations. But appellant's view is that Seabourn's night ride while drunk was a morale-builder, hence the government is liable in damages for the tortious act resulting from that exploit.

Reduced to their simplest terms, the facts of this case show beyond any doubt that Seabourn was out on a wild frolic when he injured appellant; that he was then drunk and in an irresponsible mood; that he was not then executing any military order or on military business of any kind. And if resort be had to the California cases cited in our Murphey opinion which deal with liability of a private employer (under the respondeat superior doctrine), we suggest that it would bankrupt the most exuberant imaginative powers to envision Seabourn's criminal conduct as an activity which a private employer "should reasonably have expected would be done," or that such conduct was "serving his master".

There is a further consideration of vital importance.

If there was not some rational limitation on so-called "recreational activities" such as those that led to the accident [fol. 302] here involved, the Government could be held liable in damages for every wholly independent wrongful act of a soldier while he is away from the burdens of his official army duties on a "pass" despite the fact that such acts might range through the entire category of personal and property torts having no conceivable connection with the performance of any known military duty, and certainly not within the scope of any allowable and rational "recreational activities" referred to in the Army Regulations. The short of it is that a "right" to "recreate" does not carry with it a correlative right to "keep up morale" by negligently or wilfully destroying the rights of others (in activities wholly apart from permissible recreational sports and relaxation) and thereby fasten upon the Government a financial liability for such tortious acts.

Appellee has cited certain cases thought to be apposite which bear on the question whether Seabourn was "acting within the scope" of his "office or employment" when he injured appellant. They concern activities which have relation to appellant's basic premise that since "entertainment" is essential to a soldier's "morale," Seabourn's joy ride was not only within the legitimate scope of his employment, but (under our Murphey decision) must be regarded as an activity which was in line of "military duty." A brief reference to some of these cases is justified.

A case presenting a situation somewhat comparable to one in the case at bar is King v. United States, 5 Cir., 178 F. 2d 320, cert. denied, 339 U.S. 964.

The "line of duty" language was used to "more correctly" describe the conduct of military personnel in acting for the Government. United States v. Eleazer, 4 Cir., 177 F. 2d 914, 918, cert. denied, 339 U.S. 903.

"Congress was undertaking with the greatest precision to measure and limit the liability of the Government under the doctrine of respondeat superior." United States v. Campbell, 5 Cir., 172 F. 2d 500, 503, cert. denied 337 U.S. 957, where the "line of duty" argument is considered.

The Supreme Court has stated that while on leave, a soldier "is at liberty to go where he will during the permitted absence, to employ his time as he pleases, and to

surrender his leave if he chooses. If he reports himself a
[fol. 303] the expiration of his leave, it is all that can b
asked of him." United States v. Williamson, 90 U.S. 411
415.

The "leave" is a favor extended "for his sole accommo
dation" to permit him to "enjoy a respite from militar
duty." Cf. Foster v. United States, 43 Court of Claims, 17
175. And see Hunt v. United States, 38 Court of Claims, 70
710.

When a soldier is "off duty" his conduct is "subject t
the control of no one but himself." United State v. Sharp
4 Cir., 189 F. 2d 239, 240, 241; United States v. Eleazer
supra, p. 916; and see United States v. Williamson, supra

And the application of the doctrine of respondeat supe
rior can no more suffice to make the Government responsibl
for the negligence of a soldier who is absent from his pos
of duty on a pass than it would suffice to impose liabilit
for the acts of a soldier while AWOL. See United State
v. Sharpe, supra, p. 241.

When he is off duty, he is "on his own." Rutherford v
United States, 73 Fed. Supp. 867, 868, 869, affirmed pe
curiam in 168 F. 2d 70, 6 Cir. A navy petty officer was here
involved. Holding was that this enlisted man was not "act
ing within the scope of his office or employment" unless h
was "acting in line of [naval] duty" at the time of the
accident.

The above noted cases cited by appellee serve to lend
emphasis to the views we have expressed.

We have examined the entire record with care and being
convinced that a proper result was reached by the trial
court its judgment must be, and is, affirmed.

CHAMBERS, Circuit Judge, concurs in the result.

(File endorsement omitted.)

[fol. 304] IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13,707

ALTHEA G. WILLIAMS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

JUDGMENT—Filed and Entered September 8, 1954

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

[fol. 305] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 306] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 470

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed January 31, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
DEC 6 1954
HAROLD B. WILLEY, Clerk

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 470 24

ALTHEA G. WILLIAMS,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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Attorney for Petitioner.

PERSAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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In the Supreme Court
OF THE
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OCTOBER TERM, 1954

No.

ALTHEA G. WILLIAMS,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

JUDGMENT SOUGHT TO BE REVIEWED.

Petitioner Althea G. Williams respectfully petitions for writ of certiorari to review the judgments against her in the United States District Court,

Northern District, Southern Division, and in the Ninth Circuit Court of Appeals. The opinions are reported, respectively, in 105 Fed. Supp. 208 and 215 Fed. (2d) 800. Copies are appended.

JURISDICTIONAL STATEMENT.

The judgment sought to be reviewed was entered on September 8, 1954. No rehearing was requested, nor was any extension of time sought within which to petition for certiorari.

Jurisdiction to review the judgment in question is conferred upon this court by 28 U. S. C., Sec. 1254 (1).

QUESTIONS PRESENTED.

1. May a soldier be "acting in line of duty" within the meaning of the Federal Tort Claims Act where he seeks personal recreation going to and from an overseas governmental recreational facility; is given a pass, an Army vehicle and trip ticket therefor in accordance with a long-established Army practice, even though the practice may violate an Army regulation?

2. Do federal law and federal administrative regulations, or the law of the place where an alleged tort is committed, apply in determining whether a member of the armed forces is "acting in line of duty" within the meaning of the Federal Tort Claims Act?

3. Was the term "acting in line of duty" intended by Congress to restrict federal liability under the Federal Tort Claims Act to a smaller area of liability than that of a private individual under normal principles of respondeat superior?

4. Since the sole evidence on the issue of scope of employment was documentary, may this Court review the evidence and make its own determination of that issue?

STATUTES INVOLVED.

The statutes involved herein are as follows:

28 U.S.C. § 1346, 62 Stat. 933, Amended 63 Stat. 62, 63 Stat. 101:

"(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C., Sec. 2671, 62 Stat. 982, amended 63 Stat. 106:

"'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States, means acting in line of duty."

28 U.S.C., Sec. 2674, 62 Stat. 983:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

STATEMENT OF THE CASE.

This action was brought by petitioner in the District Court of the United States, Northern District, Southern Division, under the Federal Tort Claims Act, 28 U.S.C., Secs. 1346, 2671, et seq.

At the time of the alleged tort, petitioner was a civilian employed as a part-time teacher by the Army Air Force on Guam. On the night of March 3, 1949 at about 10:30 p.m. while she was sitting in a vehicle parked near a beach area on the Island, an army vehicle crashed into the side of petitioner's car, causing painful, serious and permanent physical injuries to her.

The driver of the army vehicle was one Corporal Seabourn stationed on Guam as a supply clerk with an Army service detachment.

The evidence on the issue of scope of employment consisted entirely of written interrogatories and docu-

mentary evidence. It showed that at about 8:00 a.m. on March 3, 1949, Seabourn and two other soldier buddies, Sergeant Vincent and Pfc. Schmidt, went on pass to a tavern about a mile from their station and spent most of the morning. In the afternoon, the three hired a cab and went about the town of Agana until 6:30 p.m. when they returned to the base.

At 8:00 p.m. Seabourn went to Sergeant Stiles of his company and obtained an official "trip ticket" for a ¾ ton weapons carrier. The trip ticket was good for that vehicle until 9:30 a.m. the next day.

A certified copy of the trip ticket was introduced in evidence. It shows that it was made out to one Cabrera, at the request of a Lt. Werb, for official business. Both Seabourn and his companion, Schmidt, testified, however, that once a vehicle had a trip ticket, it could be and was the long standing Army practice to be used for either "official business" or recreation", and that it was common practice for trip tickets to be passed around among the men working in their supply section, regardless of the name of the person to whom the ticket had been issued. They testified that all the officers and enlisted men in Seabourn's unit followed the practice, and that the practice had prevailed for at least fifteen months prior to the accident.

By means of this trip ticket, Seabourn secured possession of the vehicle and his two companions then drove for recreation to the Enlisted Men's Club on the Island. There they had more drinks and decided to go for a ride. Thereafter, and prior to the acci-

dent, Seabourn let his companions out of the vehicle and drove off alone.

The trial court held, apparently as a matter of law, (105 Fed. Supp. at 209), "Even assuming that the practice testified to by Seabourn and Schmidt was known and permitted by the officers in charge, it would not make the United States liable." The court found that Seabourn's use of the weapons carrier was not for the purpose of transporting United States Army personnel under the direction of his commanding officer, nor for any purpose authorized by army regulations; that Seabourn was on a frolic of his own and used the vehicle as he might use his private automobile in seeking personal entertainment. Judgment went for defendant.

Petitioner duly appealed to the Ninth Circuit Court of Appeals. Petitioner there claimed, as she did in the trial court, that the decision in *Murphey v. U. S.*, 179 F. (2d) 743 (9th Cir. 1950) cert. den., was determinative of the issue whether Seabourn's pursuit of personal pleasure with the government provided facility may be activity within the scope of employment. Petitioner's argument was summarily rejected.

REASONS AND ARGUMENT FOR ISSUANCE OF WRIT.

I. THE COURT OF APPEALS HAS RENDERED AN ERRONEOUS DECISION ON IMPORTANT FEDERAL QUESTIONS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL AND IN CONFLICT WITH THE EXPRESS TERMS OF THE FEDERAL TORT CLAIMS ACT.

A. The Court of Appeals' opinion unduly limits the statutory definition of scope of employment of members of the armed forces.

The most vital and compelling reason for the issuance of the writ of certiorari to the Court of Appeals arises from that part of its opinion called "The Respondeat Superior Doctrine". For several pages the Court of Appeals embarks upon a novel and erroneous theory of federal liability under the Federal Tort Claims Act. Petitioner contends that this theory so woven into the decision below requires a review and reversal.

The position of the Ninth Circuit is that the definition in Sec. 2671 of the Act (that course of employment means "acting in line of duty" with respect to soldiers) was intended by Congress to relieve the government of liability in situations where private employers in similar situations would nevertheless be liable. For example, the court states that this definition "provides a clear line of demarcation between government liability for a soldier's torts and the area of general liability of a private employer * * *" Congress, according to the Ninth Circuit, sought by this definition "to adopt a drastic modification of this 'master and servant' doctrine." (p. 807.)

Petitioner contends that this theory is the first judicial attempt to controvert the express terms of

the Act, which provides: "The United States shall be liable respecting the provisions of this title relating to tort claims *in the same manner and to the same extent as a private individual under like circumstances,* but shall not be liable for interest prior to judgment or for punitive damages." 28 U.S.C., Sec. 2674.

This position of the Ninth Circuit also conflicts with numerous cases in other jurisdictions. In fact, it conflicts with one of the very cases cited by the court, *U. S. v. Campbell,* 172 Fed. (2d) 503 (5th Cir. 1949), wherein that court stated: "The very heart and substance of the act is to be found in the words 'scope of his office or employment' not as appellee would read them when wrenched out of their context but as they are precisely limited in it *to the circumstances where the United States, if a private person, would be liable* to the claimant and *in accordance with the law of the state where the injury occurs.*" This rule is repeated in *Costley v. U. S.,* 181 Fed. (2d) 723 (5th Cir. 1950); *Hubsch v. U. S.,* 174 Fed. (2d) 7 (5th Cir. 1949).

The importance of the position taken by the Ninth Circuit becomes acute when liability in the instant case is analyzed under normal master-and-servant principles. These principles obviously were intended by Congress to be applied in determining the issue of scope of employment when it provided in Sec. 2674 that the government should be liable "in the same manner and to the same extent as a private individual *under like circumstances.*"

Normally the issue of scope of employment is determined by considering the "circumstances" surrounding the tortious act. Thus, as set forth in Restatement of Agency, Sec. 229, it is important to consider many factors, among them whether or not the act is *commonly* done by such servants, the time, place and *purpose* of the act, the previous *relations between the master and servant,* whether or not the instrumentality by which the harm has been done was furnished by the master to the servant and other factors. Under normal Agency Law, even forbidden and criminal acts may be within the scope of employment. *Rest. Agency,* Secs. 230, 231.

But turning to the opinion of the Court of Appeals we find the court apparently holding that at the very time and place of the alleged tort a soldier must actually be acting under the authority or direction of a superior officer, *and all within the framework of Army Regulations.* This is apparent when the opinion is inspected to determine upon what factors the court grounds its novel discussion of federal liability under the doctrine of Respondeat Superior. The court, in attempting to distinguish the *Murphey* and *Johnson* cases (pp. 805, 806) from the case at bar, relies on the fact that there was an absence in those cases of evidence of drunk driving. Does this mean that if a soldier violates an Army regulation by driving while drunk he may not be acting within the scope of employment? The court erroneously states that appellant's position was based on the assumption

that "Seabourn was actually indulging in an authorized and permissible form of recreation" *at the time* he crashed his Army vehicle into appellant's car. No private employer authorizes a servant to commit negligence; yet private employers every day are held liable therefor. Most important, however, is that the appellate court, as well as the trial court, refused to consider the effect of what they called a "loose Post practice" of passing around trip tickets for personal recreation. The court merely states that this practice was a violation of an Army regulation. Certainly this practice would be one of those circumstances set forth in *Restatement of Agency,* Sec. 229, namely, whether or not the act is one *commonly* done by such servants, or previous relations between master and servant. The court also facetiously and erroneously states appellant's position that "Seabourn's night ride while drunk was a morale builder, hence the government is liable in damages for the tortious act resulting from that exploit." Appellant's position is, to the contrary, that the "circumstances" of this case permit of liability under Respondeat Superior not because Seabourn was authorized to drive while drunk, but because the act of driving for *recreation* was an act "done commonly by such servants", because the instrumentality by which the harm was done was furnished by the master to the servant and because of other factors mentioned in *Rest. Agency,* Sec. 229. The Ninth Circuit refuses to apply these normal rules. Apparently only if the tortious act is authorized may the government be liable. This error should not stand.

B. The Court of Appeals erroneously holds that federal laws and regulations are to control in determining whether a soldier is "acting in line of duty", whereas the Act requires that the issue of "scope of employment" is to be determined by the law of the place where the tort occurs.

The Federal Tort Claims Act explicitly provides that the issue of "scope of employment" is to be determined by the law of the place where the tort occurs. See 28 U.S.C., Secs. 2674 and 1346. As a corollary of its restriction of federal liability, under Respondeat Superior, the Court of Appeals however holds that the question of whether a member of the armed forces is "acting in line of duty" is to be determined by *federal* laws and regulations. Such is the apparent basis for the court's refusal to consider the effect of petitioner's evidence that, while possibly in violation of army regulations, Corporal Seabourn followed the usual channels and procedure in seeking personal recreation at an enlisted men's club by (1) obtaining an official pass for recreation, (2) obtaining the usual military vehicle trip ticket, (3) obtaining the vehicle from the motor pool, and (4) checking out at the dispatcher's office when he left the base. Finding that this procedure and custom violated an army regulation, the court refused to consider these factors in determining whether Seabourn was acting in the course of his military employment, or, considering the violation, finds that it is conclusive on the issue. This position in effect means that whenever a case involving military personnel arises under the Federal Tort Claims Act, the liability of the government shall be determined by what is to the particular plaintiff a fortuitous fact, that is,

whether or not the serviceman is performing an act which has or has not as yet not been covered by a regulation, regardless of the governmental purpose being served or of the right of control. No matter what might be the course of the soldier's employment *in fact,* the government may be held free of liability because an administrative agency has had the forethought to enact regulations bounding the scope of his employment by *fiction.*

The danger and inequity of this doctrine is amply illustrated by two recent cases in other jurisdictions. In *Watt v. U. S.,* 123 F. Supp. 906 (E.D. Ark. N.D. Sept. 13, 1954) a national guard company's "unit administrative assistant" drove a truck to the headquarters of a U. S. Property and Disbursing Office for the purpose of delivering to him clothing formerly issued to the company and to draw additional supplies and equipment. This was obviously a governmental purpose. His passenger was the "unit caretaker" of the company. Both were sergeants first class. Had the passenger been driving the truck, there would have been no question but that he was acting within the scope of his employment. However, the court found that certain compartmentalizing regulations of the army prescribed different administrative duties for the driver. The Assistant Adjutant General for Arkansas testified, nevertheless, that the duties of an "administrative assistant" and "unit caretaker" customarily overlapped *in practice.* (But the court held that the *regulations* were the boundaries of the driver's scope of employment, that the usage and cus-

tom of the driver's unit would not extend the scope of the driver's employment. In *McConville v. U. S.,* 197 F. (2d) 680 (2d Cir. 1952) a result was reached quite opposite to the result reached by the Ninth Circuit below, and yet there were very similar facts. In that case the government proffered testimony that the driver of the army truck had procured the truck for the purpose of drinking beer off the base which he did do. The court held the testimony immaterial noting that "proper authorization for a trip whose *claimed* purpose was permitted by *regulations* was all that needed to be established." (p. 684.) (Emphasis added.) In other words, the driver had procured a "proper" trip ticket for what must have been an improper and non-governmental purpose. Thus we have the rather ridiculous comparison of the case at bar, where the tortfeasor was acting honestly, in accordance with long established usage and custom, and the *McConville* case, where the tortfeasor used fraud in securing a "valid" trip ticket. In the former case, the Court of Appeals has found no liability. In the latter case the court holds that this fraudulent intent is immaterial!

Making governmental liability dependent upon federal law and regulations is not only illogical and unfair but also conflicts with decisions of other courts of appeals. Thus in *U. S. v. Campbell,* 172 F. (2d) at 502, the appellee attempted to claim that the opinions of the Attorney General and rulings of the Judge Advocate General given in connection with claims of military personnel against the government, and which

construed the phrase "line of duty", had *broadened* the meaning of "acting in line of duty" *beyond* the liability of a private employer and that the court was bound to follow this broadened federal definition. The court expressly disapproved this argument and held that the government, in accordance with the terms of the statute, shall be liable *in the same manner and to the same extent as private persons under the Doctrine of Respondeat Superior.*

This Court should resolve the conflict as to what law is to be applied in determining the issue of scope of employment of members of the armed forces. The Court of Appeals, through the guise of construction, should not be permitted to establish judicial precedent directly contrary to the express provisions of the Tort Claims Act. The Congress, in waiving immunity, should not, in one breath, be said to have waived liability, and then have permitted administrative agencies, through fictional regulations, to clothe the government with immunity. The rights of future plaintiffs should not depend upon the fortuitous wording of administrative regulations.

II. THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND HAS SO FAR SANCTIONED SUCH A DEPARTURE BY THE DISTRICT COURT AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

A. The Court of Appeals misstates or misconstrues petitioner's argument and authorities.

Rarely can a litigant complain that the accepted course of judicial proceedings has not been followed by a trial or appellate court. Petitioner, however, feels that the opinion of the Ninth Circuit demonstrates such a non-judicious attitude toward an aggrieved party as to call for this Court's supervisory power.

The whole tenor of the opinion is of a facetious and arbitrary dismissal of petitioner's argument. It is replete with the evasive forensic device of argument *reductio ad absurdum*. For example, the court, erroneously, states that the basis of petitioner's argument is that "Seabourn was actually indulging in an authorized and permissible form of 'recreation' at the time he crashed his army vehicle into appellant's car," and that "appellant's view is that Seabourn's night ride while drunk was a morale-builder, hence the government is liable in damages for the tortious act resulting from that exploit". An appellate court should not be permitted to support its own opinion by misstating the losing party's argument.

Petitioner feels that the court must either have failed adequately to analyze petitioner's argument and its own precedent or must have emotionally fled from

normal judicial decorum. In either event, this Court should review the opinion.

PETITIONER'S ARGUMENT HAS BEEN CONSISTENTLY BASED UPON THE RULE OF *MURPHEY v. U. S.*, 179 F. (2d) 743, DECIDED BY THE NINTH CIRCUIT, AND, SIGNIFICANTLY, DISSENTED IN BY THE JUDGE WHO WROTE THE OPINION BELOW IN THE INSTANT CASE. THE *MURPHEY* CASE HOLDS THAT IMPROVEMENT OF MORALE IS A PARAMOUNT MILITARY AND GOVERNMENTAL PURPOSE AND THAT WHERE A PARTICULAR SOLDIER PURSUES THAT OBJECTIVE AND SEEKS RECREATION AND RELIEF FROM THE ISOLATION AND MONOTONY OF HIS POST, WITH AN ARMY VEHICLE, HE MAY BE ACTING WITHIN THE SCOPE OF HIS MILITARY SCOPE OF EMPLOYMENT.

Petitioner claims that proof of authority to seek personal recreation with an army vehicle was ample in the case at bar. This proof lies in the so-called "loose post practice" ignored by the courts below. In other words, the furnishing of the army vehicle to Corporal Seabourn for recreation and the corporal's use therefor was an act in furtherance of this paramount military and governmental purpose.

Petitioner does not claim, as the Court of Appeals says she claims, that the corporal's drunk-driving was authorized, nor that at the time and place of the accident the corporal had "a 'right' to 'keep up his

morale' by negligently or wilfully destroying the rights of others" (in the language of the Court of Appeals). Petitioner does claim, however, in accordance with general master-and-servant law, that the doing of an authorized act in a wrongful or prohibited manner will not preclude responsibility of the employer. *Restatement of Agency,* Sections 229, 230; *Fields v. Sanders,* 29 Cal. (2d) 834, 839; *Haworth v. Elliott,* 67 Cal. App. (2d) 77, 81; *Hiroshima v. P. G. & E. Co.,* 18 Cal. App. (2d) 24. There therefore is little reason for the mock surprise at petitioner's argument which one finds running throughout the opinion below.

B. The Court of Appeals fails to apply and give effect to its own precedent upon which petitioner's argument and case is based.

A strange aspect of the opinion below is that it was written by the dissenting judge in the *Murphey* case, and he takes it upon himself to "distinguish" that decision. The concurring judge was not a signatory to the *Murphey* case.

The alleged distinctions which the dissenting judge in the *Murphey* case finds between the case at bar and the *Murphey* case illustrate the advocate attitude of the court. Petitioner can believe only that the learned judge failed to analyze the facts of that case and the reasons for the decision of the majority. Certainly, he did not like it.

The learned judge asserts these distinctions: Unlike Corporal Seabourn, the army driver in the *Murphey* case was acting under "specific authorization of his

commanding officer", to take the truck into town "for pleasure under instructions" for "entertainment, movies, etc.", and that the majority of the court thought that the "official permission" thus granted was broad enough to include a visit to an Indian dance being held a short distance outside of town, and that this "digression" to the place of the dance was with knowledge of his superior officers. The judge says, "it was not contended that he was drunk at the time, or that drinking contributed in any way to his negligence".

The facts omitted by the learned judge below are that the *Murphey* case truck driver visited a *saloon,* and *then* started in the truck for the Indian ceremonial, *on the way meeting two lady friends who boarded the army vehicle.*

The trial court in the *Murphey* case found that "special permission was required to use the vehicle for the pleasure of the men to go to any place other than Klamath", and that the truck driver was not authorized to operate the motor vehicle for his or his companion's personal use or for any other use than that of driving the truck to the town of Klamath and parking the vehicle by the side of a building. The appellate court in the *Murphey* case, however, looked to testimony that there had been at prior times permission to use the truck for recreation in places of short distances outside of Klamath, which had been done with the knowledge of the truck driver's superior officer and that no permission was needed to drive it

to the Indian ceremonial. Is this not evidence of custom and usage?

The appellate court in the *Murphey* case held the government liable because the truck was used for the "broad purposes" of seeking "entertainment and movies, etc.", even though the truck driver had instructions that he was not free to use it in a particular manner accomplishing that purpose. The court below seeks to find some distinction in the fact that in the *Murphey* case the overriding "specific" purpose was the importance of the morale of soldiers in seeking "entertainment, movies, etc.". The court felt that the term "movies, etc." included the Indian ceremonial and that the truck driver in driving to the Indian ceremonial was seeking "specified entertainment". Petitioner contends that this is a distinction without a difference. The testimony in this case was that the soldiers on Guam were authorized to use army vehicles for "recreation". Petitioner can find no distinction between "entertainment" and "recreation", or "movies, etc." and "recreation". Corporal Seabourn was seeking, specifically, "recreation".

The opinion below relies on a statement in the *Murphey* case that the truck driver's superior officer knew that as incidental acts the truck was employed to reach places of entertainment outside of Klamath. But there likewise is testimony in this case that the use of army vehicles for "recreation" had been a long established practice indulged in by all members of Corporal Seabourn's post, officers included. It is a

certainty that Corporal Seabourn's superior officers likewise knew of this long established custom.

It therefore appeared and still appears to petitioner that no honest distinction exists between the *Murphey* case and the case at bar. YET WE FIND A DISSENTING JUDGE FAILING TO APPLY A DIRECT PRECEDENT OF HIS OWN CIRCUIT AND IN EFFECT ADOPTING HIS OWN DISSENT AS THE LAW FOR THAT CIRCUIT WITHOUT OVERRULING THE PREVIOUS DECISION. Certainly this is improper judicial procedure and should not be condoned by this Court. Future litigants are entitled to know whether or not the *Murphey* case or this case is the law of the Ninth Circuit. Unlike petitioner herein, they should not have to find out at their own risk.

Wherefore, your petitioner prays that a writ of certiorari issue to the Court of Appeals for the Ninth Circuit, to the end that the errors aforesaid may be corrected by this Court.

Dated, San Francisco, California,
November 29, 1954.

Respectfully submitted,
HENRY C. CLAUSEN,
Attorney for Petitioner.

(Appendices A and B Follow.)

Appendix A

In the United States District Court for the Northern District of California Southern Division

No. 28,870-E

Althea G. Williams,
Plaintiff,
vs.
United States of America,
Defendant.

Action under the Federal Tort Claims Act for damages for personal injuries. Judgment for defendant, in accordance with opinion.

Henry C. Clausen, San Francisco, California, attorney for the plaintiff.

Chauncey Tramutolo, United States Attorney; Rudolph J. Scholz, Assistant United States Attorney, both of San Francisco, California, attorneys for the defendant.

Memorandum Opinion

ROCHE, Chief Judge: Plaintiff has brought this action under the Federal Tort Claims Act, 28 U.S.C.

921, to recover damages for injuries sustained through the negligence of an intoxicated soldier. The negligence and plaintiff's injuries are not disputed by the defendant. The sole question for decision is whether the soldier was acting within the course and scope of his employment within the purview of the Tort Claims Act. Its determination requires a careful examination of the facts, as disclosed by the record. From the evidence of defendant's witnesses, all of whom testified by deposition, the following facts appear.

The accident occurred on the evening of March 3, 1949, on the island of Guam. Plaintiff was sitting in a vehicle which was parked at the end of the Breakwater road at the little town of Agana when it was struck by a weapons carrier driven by one Seabourn, a Corporal in the United States Army. Seabourn's regular duties were as clerk in supply. He testified that he did not work on the day in question but had taken time off and stayed around his base until about noon, when he left on a pass with Cpl. Benson and Pvt. Schmidt of his company. After spending the afternoon drinking beer they returned to the base about seven p.m. and Seabourn picked up a trip ticket for the weapons carrier. (A trip ticket is authorization from a unit Commander to use a particular vehicle on official business.) Accompanied by Benson and Schmidt, he drove to the Enlisted Men's Club, where they indulged in champagne as well as beer, and then decided to take a ride. At some time prior to the accident, Seabourn let both friends out of the vehicle and he testified that that was the last he re-

membered until the following morning when he awoke beside the road.

A certified copy of the trip ticket was introduced in evidence. It shows that it was made out to one Cabrera, at the request of Lt. Werb, for official business and was good for 24 hours. It further shows that the vehicle was attached to the 374th Maintenance Unit; that it was dispatched from the Motor Pool, and was scheduled to go to various official places. Seabourn testified that he picked up the trip ticket from Sgt. Stiles of his company; that it was common practice for trip tickets to be passed around among the men working in that section, regardless of the name of the person to whom the ticket had issued; and that this was so whether the vehicle was to be used on official business or for recreation. Schmidt testified that once a vehicle had a trip ticket, it could be used for either official business or recreation. On the other hand, Sgt. Stiles stated that the vehicle was to be used for official business only; that because the maintenance unit was on duty twenty-four hours a day the vehicle was on 24 hours dispatch and was used officially by all men in the section who had permits; that it was good on the post only.

Even assuming that the practice testified to by Seabourn and Schmidt was known and permitted by the officers in charge, it would not make the United States liable. The sovereign cannot be sued without its consent. By the Tort Claims Act the United States has consented to be sued for the negligence of its employees only when they are acting within the

scope of their employment which, in the case of military personnel, means acting in line of duty. To determine whether the person inflicting the injury was an employee so acting, we look to Federal law and decisions. Local law is looked to only to determine whether the act with which the person is charged gives rise to a tort liability. *United States v. Sharpe,* 189 F2d 239. So-called "permissive use" statutes are thus inapplicable and liability cannot be imposed on the United States for negligence of an employee acting outside the scope of his employment, even though the employee's activity has the express or implied permission of the sovereign agents. *Long v. United States,* 78 F. Supp. 35.

Plaintiff argues that Seabourn was acting within the scope of his employment because he was seeking entertainment; that entertainment is essential to a soldier's morale; and that proper morale is necessary to the maintenance of efficiency in the armed forces. To support her position plaintiff relies on a recent Ninth Circuit case, Murphy v. United States, 179 F. 2d 743, in which, by a two to one decision, the Court of Appeals reversed a District Court Judgment in favor of the United States. This decision, of course, is binding on this Court if the facts in the instant case fall within its framework. Unfortunately, there is one essential difference which forces the court to conclude that plaintiff's action must fail.

In the Murphy case a soldier negligently drove an army vehicle into a narrow bridge in the face of an oncoming group of pedestrians, thereby causing

one of them to fall to her death. There, as here, the sole question was whether the soldier was acting within the scope of his employment at the time. In holding that he was, the two-judge majority relied on the following facts. Twenty Air Corps soldiers staffed a radar post about three miles from the small town of Klamath, Oregon, which was their only available source of entertainment. Under the authority of the commanding officer pursuant to Army Regulations 700-105 (28), a truck was provided for nightly visits to Klamath for the men's entertainment. The pertinent Regulation provides that Army vehicles may be used by special direction of the Commanding Officer for transporting personnel in connection with authorized, organized and supervised recreational welfare and morale building activities. Once the men reached Klamath the truck was to be parked by a certain building and left there until time for the return trip. On the night in question this was not done. Instead, the driver, accompanied by another soldier, used it to drive to an Indian ceremonial dance being held two or three blocks from the center of town. The accident happened while they were en route. The District Court was reversed on the ground that the driver's recreational use of the truck for himself, after bringing the other soldiers into town, was a military employment because it was as important to the United States to maintain the morale of one soldier as of many and the Indian ceremonial would fall within the class of "authorized * * * recreational activities" as certainly as would motion picture shows or dances. The court cautioned, how-

ever, that it was here concerned only with specifically allowed amusements and that its decision did not mean that "in any case where the soldier is on a frolic of his own he can make the government liable simply because he there found entertainment."

Clearly in the present case Seabourn was on a frolic of his own. His use of the weapons carrier was not for the purpose of transporting personnel, under the special direction of his Commanding Officer, for any purpose authorized by the Regulation, nor was it incidental to such use. On the contrary, he used it as he might his private automobile in seeking personal entertainment. This was a use contrary to the express purpose of the trip ticket and one not authorized by any of his superior officers. To hold that in so doing he was acting within the scope of his military employment would be an unwarranted extension of the terms for which even the liberal construction in the Murphy case would not be authority.

In accordance with the foregoing, therefore, it is by the court

Ordered that there be entered herein, upon findings of fact and conclusions of law, judgment in favor of the defendant and that the respective parties bear their own costs.

Dated, June 4, 1952.

Michael J. Roche,
Chief United States District Judge.

Original Filed Jun 4 1952, Clerk, U. S. Dist. Court, San Francisco.

Appendix B

United States Court of Appeals
for the Ninth Circuit

Althea G. Williams, Appellant, vs. United States of America, Appellee.	No. 13,707 Sep. 8, 1954

Appeal from the United States District Court for the Northern District of California, Southern Division

Before: MATHEWS, BONE and CHAMBERS, Circuit Judges

BONE, Circuit Judge.

This is an appeal from a judgment denying relief in an action under the Federal Tort Act, herein "the Act." The decision of the lower court is reported in 105 Fed. Supp. 208.

At all times here pertinent appellant was a civilian employed as a teacher by the Army Air Force, and also as a secretary by a private construction firm operating on the Island of Guam. She was injured on the night of March 3, 1949, at or about 10:30 P.M. while sitting in a vehicle then parked on a "turn-

about" place located on the end of what was called the Crystal Breakwater, this being an area on the Island reserved for "parking" purposes, and a place where cars were customarily parked.

At the time above mentioned an army vehicle then being driven by one Seabourn (a clerk in the Supply Department of the United States Army based on the Island) crashed his vehicle into the side of appellant's car, causing the physical injuries upon which this action was based. There was overwhelming evidence that Seabourn was drunk at the time.

Pertinent provisions of the Act, Title 28 U.S.C.A., read as follows:

§ 1346:

"(b) * * * the district courts * * * shall have * * * jurisdiction of civil actions on claims against the United States, for money damages * * * for * * * personal injury * * * caused by the negligent * * * act * * * of any employee of the Government while acting within the scope of his office or employment, under circumstances where * * * a private person, would be liable to the claimant in accordance with *the law of the place* where the act * * * occurred." (Emphasis ours.)

§ 2671: "'Acting within the scope of his office or employment', in the case of a member of the military or naval forces of the United States, *means acting in line of duty.*" (Emphasis ours.)

§ 2674: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same

extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

THE QUESTION PRESENTED

Whether the United States is liable, under the terms of the Act (above quoted) for the negligent acts of a soldier which occur when the soldier is seeking personal recreation during the period he is off duty and away from his army base on a pass.

Relevant and applicable provisions of the Civil Code of Guam and Army Regulations are set forth in the margin.[1]

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[1]Section 2338 of the Civil Code of Guam provides as follows:

"2338. Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal."

Army Regulations 700-105 (30 June 1948) provide in pertinent part as follows:

"26. Use of vehicles.—• • •

b. Motor vehicles • • • will be operated • • • only if properly dispatched on WD Form 48 (Driver's Trip Ticket and Preventive Maintenance Service Record), issued by the dispatching motor pool or under such instructions as the appropriate commander under existing authority may direct.

c. Motor vehicles will be used only for official business, including the special uses listed in paragraph 28.

• • • • • •

28. Special uses.—Motor vehicles, when available without detriment to other official business • • • may be used by special direction of the commanding officer for the following purposes:

a. Authorized athletics.

b. Transporting personnel, including entertainers and party guests and supplies and equipment in connection with authorized,

THE FACTS

There was credible and competent evidence of a convincing character from which the trial court could have inferred and concluded that the facts which we here summarize were fully established as true.

Seabourn obtained an appropriate pass to leave the army base on and for the day of March 3, 1949. Accompanied by two other soldiers (Schmidt and Vincent) he spent the afternoon drinking beer. The three men returned to the base about 7 P.M. and while there, a Sergeant Stiles, a member of Seabourn's company, gave Seabourn a so-called "trip ticket" for a ¾ ton vehicle known as a "weapons carrier." This ticket had been made out about 8 A.M. that morning to a driver named Cabera,* a soldier who also worked with Seabourn and it discloses that the vehicle had been requested by a Lt. W. R. Werb, and use of the vehicle was therein authorized for "Official Business." Listed on the ticket are the various official points to which the weapons carrier was driven that

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organized, and supervised recreational, welfare, and morale-building activities.

• • • • • •

29. Motor pools.—• • •

d. Vehicles will be dispatched from pools to perform specific tasks, and will not be permanently allocated or assigned to any agency or individual, except as prescribed herein."

Section 2338 of the Guam Code follows the language of a comparable section in the California Code, thereby adopting for Guam the rule of respondeat superior in force in California. It is thus "the law of the place," i.e., Guam.

*The driver's name is indicated in the text of the trip ticket as *Cabrera*. However, the ticket was signed by *Cabera*, who is obviously (there) spelling his name correctly.

day.[2] Neither Seabourn's nor Stiles' name appears on the ticket, nor was Seabourn's use of the vehicle in any way indicated thereon.

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[2] "DRIVERS TRIP TICKET AND P. M. SERVICE RECORD
2272365

Drivers Name Cabrera* Date 3-3-49
Report to Lt. Werb Time out 0810
Organization DMP Time in 1500
DEPARTMENT OR ADDRESS 374th Maintenance
KIND OF WORK OR ROUTE Official Business
REQUESTED BY Orgn, or individual Lt. Werb
/s/ Nix
Dispatchers signature

SPEEDOMETER IN	OUT	Total miles	HOUR METER in	out	Total hours
7129	7041	88	0310	0810	24

fuel added 10 gals
Oil added 0

I have performed the "preventive maintenance service of this form and recorded all deficiencies and any accident

/s/ Cabera*
Drivers signature

I have noted all entries on this form and taken necessary action

TRIP OR LOAD RECORD

FROM	PASSENGERS OR WEIGHT	SPEEDOMETER OR HOUR 7041
Motor Pool		
TO Base Supply		
TO Warehouse 1		
TO 374 Maintenance		
To Service Stock		
To Hangar 6		
To 376th Supply		
To Hq Base Squadron		

Vehicle released at 0315-7129
Official User (signature and grade)
/s/ William R. Werb, Jr. 1st Lt. USAF"

CERTIFIED A TRUE COPY
WOODROW W. JAY
Civilian Official in lieu
of Claims Officer Guam
District, Corps of Engineers
Exhibit L Report of Claims
Officer U.S.A. No. 2362773
5 April 49

By means of this "ticket", Seabourn secured possession of the vehicle and in company with the two men named drove to the Enlisted Men's Club on the Island where they drank more beer as well as some champagne, and then they decided to "go for a ride." Thereafter, and prior to the accident here involved, Seabourn let his companions out of the vehicle and drove off alone. These companions later swore that Seabourn was then "definitely drunk," and Seabourn himself swore that he remembered nothing further until the next morning when he awoke beside a road.

Seabourn's use of the vehicle while thus "off duty" and in quest of entertainment, was not a use in furtherance of any prescribed or indicated military duty. The vehicle was not being used in Seabourn's "off duty" period to serve any prescribed or noted military purpose or interest of the government, nor was Seabourn's use motivated by such a purpose. His superior military authorities had no knowledge of, or supervision over, the use of the vehicle while it was in Seabourn's possession, nor any control over Seabourn after he had secured it from Stiles by using the Cabera ticket which had been previously issued by Lt. Werb (see footnote 2). Nor was any military order issued by a superior officer directing or authorizing Seabourn to use the vehicle for *any purpose,* military or otherwise (including "recreation"), or for the execution of any military order.

The facts as we have outlined above are fully reflected in the record before us.

On the material issues in this case the lower court found that the accident occurred on the date, at the place and under the conditions we have noted above; that Seabourn was a corporal in the United States Army stationed on the Island of Guam and assigned to Headquarters Base Service; that he was off duty and away from the base on a pass at the time; that he and two associates spent the afternoon of the day in question drinking beer and the three men returned to the army base about 7 P.M. of the day in question where Seabourn obtained unauthorized possession of the vehicle he used, after which Seabourn, accompanied by his two companions, Vincent and Schmidt, drove the vehicle to the Enlisted Men's Club on the Island where they indulged in champagne as well as beer, after which they decided "to take a ride"; that some time prior to the accident Seabourn let both of these companions out of the vehicle, and that is all Seabourn remembered until the morning following the accident, when he awoke beside the road; that the bodily injuries of plaintiff resulted from the accident which was entirely due to the negligence of Seabourn; that Seabourn's use of the weapons carrier was not for the purpose of transporting United States Army personnel under the direction of his commanding officer, nor for any purpose authorized by army regulations; that Seabourn was on a frolic of his own and used the vehicle as he might use his private automobile in seeking personal entertainment.

On these findings the court entered conclusions of law setting forth that Seabourn, an employee of the

defendant, was not acting within the course and scope of his employment and that plaintiff is not entitled to recover from the United States, and the respective parties should each bear their own costs.

Judgment was thereupon entered in favor of the Government.

SPECIFICATION OF ERRORS

It is sufficient to say that appellant's specifications of error not only challenge all of the findings and conclusions of the lower court which are material to the issues posed on this appeal, but also the failure of the lower court to make certain proposed findings and conclusions tendered by appellant which reflect her theory of federal liability for Seabourn's tort.

APPELLANT'S POSITION

We summarize what appears to us to be the substance of appellant's contentions on this appeal:

She urges that despite the court's findings, the fact remains that Seabourn was seeking "entertainment"; that such a "diversion" is essential to a soldier's "morale," and as a (legal) consequence, his late joy ride in the army vehicle was within his "scope of employment." Relying on this theory, she sees a perfect analogy between the facts of the instant case and those discussed in our opinion in Murphey v. United States, 179 F. 2d 743, and she also assures us that the case before us narrows to a consideration of only two points which are determinative here, these

eing the facts, and this Court's views as expressed y the majority in the Murphey case.

Appellant frankly states that she is content to "rest er case" on the Murphey decision, and accompanies his concession with a lengthy discussion of the hold- ng in that case.

We disagree with appellant's contention that our ecision in Murphey v. United States, supra, when aid off against the facts revealed by the record before s, is dispositive of the vital and controlling issue n the instant case. We are fully persuaded that the Murphey case is clearly distinguishable on the facts. There we pointed out that Sergeant Brander drove n army truck to the town of Klamath under *specific uthorization* of his commanding officer. He was uthorized to take it into the town "for pleasure," *nder instructions* that it might be used to carry some oldiers into the town "for entertainment, movies, tc." The majority of this Court thought that the fficial permission thus granted was broad enough to *nclude* a visit to an Indian dance (certainly in itself harmless diversion) being held only a short distance utside the town, this because Brander's "digression" o the place of the dance was with "knowledge of his] superior officers." The basic assumption on ur part was that attending the dance was within he concept of allowable "recreation" *because* it was or "entertainment, movies, etc." Brander's com- manding officer testified that "it was supposed that he truck would be parked alongside a building in he town until it was to be returned to the army amp."

Brander was negligent in his driving but it was not contended that he was drunk at the time, or that drinking contributed in any way to his negligence.

The accent in the Murphey opinion is on *recreational use* of the army vehicle for "improvement of Brander's morale" and the majority of the court found support for this interpretation of "recreation" in an opinion of the Judge Advocate General that "engaging in *allowed athletic exercise*" is within a soldier's "line of duty." Then we proceeded to find a suitable analogy in an Admiralty case holding that in seeking allowed recreation, a seaman "was in the course of his maritime employment" when after going ashore, *he injured himself* while diving into a shallow swimming pool. No cases in the field of Admiralty are cited (and probably not one could be found) which support the view that a ship could be held legally liable in damages to a civilian who was the victim of a wholly independent tort committed against his person by a sailor while the latter was "recreating" ashore on leave from his ship.

As the Admiralty case we cited points out, shore leave for a seaman is an old part of the business of sailing ships. The present day *status* of a sailor has also preserved his traditional right (as a ward of admiralty) to "cure and maintenance." Even this ancient right is lost when his voluntary misdeed is the active cause of his physical disability or sickness. And certainly the historical legal status of a sailor is far removed from the military status of a soldier.

In the Murphey case we carefully delimited the area of federal liability by the frank and illuminating statement that:

"This case concerns specifically allowed amusements, here 'movies, etc.' in the town of Klamath. *We are not holding that in any case where a soldier is on a frolic of his own he can make the government liable simply because he there found entertainment.*

"We think the *overriding purpose* in Brander's employment in the use of the truck in the town of Klamath *is the improvement of the morale of the soldiers in seeking 'entertainment.'* The 'movie, etc.' certainly would include the Indian ceremonial. The government being liable as a private person in California, it is liable where the truck was in use for the broad purpose for which it was employed by Brander, even though he had instruction that he was not 'free' to use it in a particular manner accomplishing that purpose.

* * * * * * * *

"Here Brander was seeking *the specified entertainment* which would *improve his military morale.* That he was 'directly or indirectly serving his master' in so doing is none the less within the scope of that employment, because he was serving his own desire and that of the other sergeant seeking recreation in taking the latter's two lady friends to the ceremonial." (Emphasis ours)

And we again emphasized the significance of such a holding in language used in United States v. John-

son, 181 F. 2d 577 relative to the conduct of a driver of a navy vehicle. We specifically referred to the *absence* of evidence showing that the driver was "on a frolic of his own" at the time of the accident there involved. There this Court considered the case of a civilian in Guam who was injured when a navy vehicle in which he was riding overturned. The driver of the vehicle was a navy pharmacist's mate. Our ultimate holding was that the doctrine of res ipsa loquitur was applicable, because the vehicle suddenly started to "shimmy" and quickly rolled off the road. Upon the assumption that this unexplained action of the vehicle (wholly within the control of the navy) spelled out careless inspection or construction (careless or "drunk driving" of the vehicle at the time was not evident) we applied the res ipsa loquitur doctrine and held the Government liable under the Act.

Under the facts in the Johnson case (also relied on by appellant) we also held that the driver was on official navy business at the time (and therefore "acting in line of duty") despite some "deviations" (for personal errands) from what would have been a normal time and route in delivering a navy report. We refused to accept the argument that these slight "deviations" indicated (in a legal sense) that the driver had (thereby) departed "on a frolic of his own." This case is also clearly distinguishable from the facts in the Murphey case and the facts in the case at bar.

Appellant also argues that in Murphey we held that an employer is held liable for "incidental" acts

which he should reasonably have expected would be done though the particular act "be forbidden, or done in a forbidden manner," to which is added the assertion that this Court "emphasized that the superior officers knew that the truck was employed for such [forbidden] purposes," and that Brander's activity "directly or indirectly served the master," and were thus "within the scope of the employment." We are reminded by appellant of our reference to the "paramount significance of morale in military life," this *morale* to be achieved by *recreational activity.* And because *such activity* is authorized in Army Regulations, the employer is rendered responsible *under the Act* for the resultant negligence of the employee, this by application of the respondeat superior doctrine to this case as this doctrine is applied under California law to the "master and servant" relationship in the field of private employment. This emphasis justifies comment since both parties stress the doctrine in their briefs because of its assumed bearing on the crucial issue before us.

THE RESPONDEAT SUPERIOR DOCTRINE

Appellant's stress is on decisions of the California state courts where it was applied in cases involving the ordinary "master and servant" relationship in purely private employment. In none of the California cases cited does a court discuss (as indeed it could not) the question of *federal liability* for the tortious acts of a soldier.

The *status* of a soldier or sailor in military or naval service is quite different from the *status* of either an

employee serving a private employer or a civilian employee serving the United States, a fact which requires emphasis because of its importance in the case at bar.

The novel *status* of a soldier arising from his peculiar relationship with his Government, was clearly pointed up by emphatic language of the court in United States v. Standard Oil Co. of California, 332 U.S. 301, 305, 306, 309, 310. That decision merely brought into sharp focus the controlling legal and constitutional factors underlying such a unique relationship. Congress did not lose sight of this obvious fact while considering the many problems wrapped up in the national defense program in connection with its surrender of immunity to suit under the Act. As we point out herein, one important problem was met and disposed of by a specific provision in the Act which carefully delimited the area of federal liability for a tortious act of (as here) a soldier, by providing that such liability would attach *only* when the act was committed while the soldier was "acting in line of [military] duty." This careful delineation provides a clear line of demarcation between Government liability for a soldier's torts and the area of general liability of a private employer for torts of his employees in classical "master and servant" cases where the rule of respondeat superior is normally applied.

Comments of the court in Feres v. United States, 340 U.S. 135, 138, 141, 143, are pertinent as bearing on the peculiar status of a soldier. And see United

States v. Sharpe, 189 F. 2d 239, 241, where the court indicates that when a question of statutory construction of federal legislation is involved, federal courts are not bound by local decisions but apply their own standards—this with respect to determining the relationship of the Government to its employees.

On its face the Tort Claims Act appears to be a general act designed to cover all sorts of claims against the United States for money damages for tortious injuries to persons and property caused by the negligent or wrongful act or omission of any Government employee "while acting within the scope of his office or employment."

At first blush, some broad preliminary language in the Act would seem to embrace *all categories* of Govment employees and servants (even including members of the military and naval forces of the United States) and serve to bring them and the United States within the orbit of the orthodox respondeat superior doctrine as applied under "the law of the place" where the tortious act was committed. But this view of the meaning of the Act is completely dissipated by an inspection of its full terms. It would do violence to reason to assume that Congress did not recognize the fact that a vast number of purely *civilian employees* are on the Government payrolls, and one of its obvious purposes was to bring these employees within the orbit of the Act. While we are not here concerned with the tort of a civilian employee of the Government, the *status* of such an employee (under the Act) becomes a matter of im-

portance when the question of federal liability for his tortious act is involved. A most casual reading of the Act will make this fact very plain, and in this connection it may be assumed that as to such civilian employees, the familiar doctrine of respondeat superior, as it has been applied under California law to the commonplace "master and servant" cases, would apply.

But in dealing with the problem of federal liability for tortious acts of *members of the military and naval forces* a wholly different situation is presented because Congress saw fit to adopt a drastic modification of this "master and servant" doctrine. By carefully chosen language it delimited the area of federal liability for tortious acts of members of this group by specifically providing that so far as concerns such acts, the phrase "acting within the scope of his office or employment" shall *mean* "acting in line of duty." By use of such plain, unambiguous and highly significant language, Congress made abundantly plain that federal liability can arise *only* when the tortious act was committed at a time when the tort feasor member of our military or naval forces was actually "acting in line of duty." Unless we are prepared to utterly disregard this mandate and refuse to conform to its obvious meaning, we must (as we do in this case) hold that "acting in line of duty" means *acting in line of military duty.* If Seabourn was not acting in line of *military* duty at the time he injured appellant, the rule of respondeat superior (as applied in orthodox "master and servant" cases) loses its standardized

force for that rule has been modified in the significant manner here noted. We need not stress the fact that when the sovereign waives its immunity from suit, it may, as here, do so *on its own terms.*

And as appellee points out, appellant cites no authority for the theory that a private employer could be held liable in damages for the tortious act of an employee occurring on an allowed "day off" while he is out driving on a joy ride while drunk.

In stating her position on the issues, appellant asserts that since (under Army Regulations) a soldier may indulge in "recreation," his "off duty" recreational activities are properly to be regarded as within the scope of his "military duty." The assumption necessarily underlying this contention is that Seabourn *was actually indulging in an authorized and permissible form of "recreation"*[3] at the time he crashed his army vehicle into appellant's car. Upon no other basis can her position be sustained unless we close our eyes and agree that a loose post "practice" of "passing around" trip tickets issued only for *official use,* (when the actual use is not for official business) in some undisclosed way transformed the use by Seabourn into an authorized "official use."

The loose operation of "passing around" among enlisted men "tickets" which would give them possession of an army vehicle for joy riding and drinking

[3]We do not look to a dictionary definition of the word "recreation" as determinative, for the unchallenged Army Regulations must govern the meaning of the term since they define "recreational activities" in which army personnel may engage.

bouts, all without the knowledge or approval of their superior officers, finds no sanction in applicable Army Regulations, but to the contrary, is a clear violation of these rules.

A look at the regulations (footnote 1) will reveal that they refer only to authorized athletics, organized and supervised recreational welfare, and morale-building activities. Every recreational activity mentioned in the regulations is a far cry from a wild, reckless and wholly independent act of violence against a civilian, and we are unwilling to give sanction to appellant's basic theory that irresponsible drunkenness and irresponsible driving late at night on a "lark" or "frolic" in a wholly independent venture entirely unrelated to what we conceive to be "acting in line of duty," must be regarded by us as "recreational" conduct authorized by Army Regulations. But appellant's view is, that Seabourn's night ride while drunk was a morale-builder, hence the government is liable in damages for the tortious act resulting from that exploit.

Reduced to their simplest terms, the facts of this case show beyond any doubt that Seabourn was out on a wild frolic when he injured appellant; that he was then drunk and in an irresponsible mood; that he was not then executing any military order or on military business of any kind. And if resort be had to the California cases cited in our Murphey opinion which deal with the liability of a private employer (under the respondeat superior doctrine) we suggest that it would bankrupt the most exuberant imagina-

tive powers to envision Seabourn's criminal conduct as an activity which a private employer "should reasonably have expected would be done," or that such conduct was "serving his master".

There is a further consideration of vital importance. If there was not some rational limitation on so-called "recreational activities" such as those that led to the accident here involved, the Government could be held liable in damages for every wholly independent wrongful act of a soldier while he is away from the burdens of his official army duties on a "pass" despite the fact that such acts might range through the entire category of personal and property torts having no conceivable connection with the performance of any known military duty, and certainly not within the scope of any allowable and rational "recreational activities" referred to in the Army Regulations. The short of it is that a "right" to "recreate" does not carry with it a correlative right to "keep up morale" by negligently or wilfully destroying the rights of others (in activities wholly apart from permissible recreational sports and relaxation) and thereby fasten upon the Government a financial liability for such tortious acts.

Appellee has cited certain cases thought to be apposite which bear on the question whether Seabourn was "acting within the scope" of his "office or employment" when he injured appellant. They concern activities which have relation to appellant's basic premise that since "entertainment" is essential to a soldier's "morale," Seabourn's joy ride was not only

within the legitimate scope of his employment, but (under our Murphey decision) must be regarded as an activity which was in line of "military duty." A brief reference to some of these cases is justified.

A case presenting a situation somewhat comparable to one in the case at bar is King v. United States, 5-Cir., 178 F. 2d 320, cert. denied 339 U.S. 964.

The "line of duty" language was used to "more correctly" describe the conduct of military personnel in acting for the Government. United States v. Eleazer, 4-Cir., 177 F. 2d 914, 918, cert. denied 339 U.S. 903.

"Congress was undertaking with the greatest precision to measure and limit the liability of the Government under the doctrine of respondeat superior." United States v. Campbell, 5-Cir., 172 F. 2d 500, 503, cer. denied 337 U.S. 957, where the "line of duty" argument is considered.

The Supreme Court has stated that while on leave, a soldier "is at liberty to go where he will during the permitted absence, to employ his time as he pleases, and to surrender his leave if he chooses. If he reports himself at the expiration of his leave, it is all that can be asked of him." United States v. Williamson, 90 U.S. 411, 415.

The "leave" is a favor extended "for his sole accommodation" to permit him to "enjoy a respite from military duty." Cf. Foster v. United States, 43 Court of Claims, 170, 175. And see Hunt v. United States, 38 Court of Claims, 704, 710.

When a soldier is "off duty" his conduct is "subject to the control of no one but himself." United States v. Sharpe, 4-Cir., 189 F. 2d 239, 240, 241; United States v. Eleazer, supra, p. 916; and see United States v. Williamson, supra.

And the application of the doctrine of respondeat superior can no more suffice to make the Government responsible for the negligence of a soldier who is absent from his post of duty on a pass than it would suffice to impose liability for the acts of a soldier while AWOL. See United States v. Sharpe, supra, p. 241.

When he is off duty, he is "on his own." Rutherford v. United States, 73 Fed. Supp. 867, 868, 869, affirmed per curiam in 168 F. 2d 70, 6-Cir. A navy petty officer was here involved. Holding was that this enlisted man was not "acting within the scope of his office or employment" unless he was "acting in line of [naval] duty" at the time of the accident.

The above noted cases cited by appellee serve to lend emphasis to the views we have expressed.

We have examined the entire record with care and being convinced that a proper result was reached by the trial court its judgment must be, and is, affirmed.

CHAMBERS, Circuit Judge, concurs in the result.

(Endorsed:) Opinion and Concurrence. Filed Sep. 8, 1954. Paul P. O'Brien, Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 470

ALTHEA G. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The Memorandum Opinion of the United States District Court for the Northern District of California, Southern Division (R. 86–92; Pet. Br. App. i–vi), is reported at 105 F. Supp. 208. The opinion of the Court of Appeals for the Ninth Circuit (R. 289–303; Pet. Br. App. vii–xxvii) is reported at 215 F. 2d 800.

JURISDICTION

The judgment of the Court of Appeals was entered on September 8, 1954 (R. 304). The petition for a writ of certiorari was filed on Decem-

ber 6, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the United States is liable, under the Federal Tort Claims Act, for the negligent acts of a soldier which occur when the soldier is seeking personal recreation in an army vehicle while he is off duty and away from his base on a pass.

STATUTES INVOLVED

The relevant provisions of the Federal Tort Claims Act, the Civil Code of Guam, and the Army Regulations are set forth in the Appendix, *infra*, pp. 15–17.

STATEMENT

Petitioner, a civilian employee of a construction firm, sustained personal injuries when a parked auto in which she was sitting with a friend was struck by an army vehicle driven by Corporal J. R. Seabourn. The accident occurred at about 10:30 p. m. on the night of March 3, 1949, on a road near a beach area in the Town of Agana on the Island of Guam. Fdg. II, R. 98. Seabourn, who was a supply clerk assigned to a Headquarters Base Service Detachment stationed on the Island, was off duty that day (R. 28, 56; Fdg. III, R. 99). He had obtained an appropriate pass to leave the army base for the day (R. 28, 56; Fdg. III, R. 99).

Accompanied by two other soldiers, Private R. C. Schmidt and Corporal R. K. Benson,[1] Seabourn spent the afternoon at various taverns drinking beer (R. 28, 32, 45; Fdg. III, R. 99). The three men returned to the base at about 7:00 p. m. and while there, Sergeant Stiles, a member of Seabourn's company, gave Seabourn a trip ticket for a ¾ ton weapons carrier (R. 28, 87–88; Pet. App. x). This ticket had been made out to a driver named Cabera, a soldier who also worked with Seabourn (R. 65, 57–58). The ticket discloses that the vehicle had been requested by a Lieutenant W. R. Werb, and that the vehicle had been issued to Cabera shortly after 8 a. m. for "Official Business."[2] Listed on the ticket are the various official points to which the vehicle was driven that day, *e. g.*, from the Motor Pool to Base Supply, to Warehouse 1, to 374 Maintenance, etc. Neither Seabourn's nor Stiles' name appears on the ticket, nor is Seabourn's use of the vehicle in any way indicated.[3]

[1] Cpl. R. K. Benson was sometimes referred to as Cpl. R. K. Vincent during the trial and is so named in the opinion of the court below. It was stipulated that both names refer to the same person (R. 238).

[2] The trip ticket (R. 65) is set out in the margin of the opinion below (R. 292; Pet. App. xi).

[3] Seabourn testified that it was common practice for trip tickets to be "passed around" among the men working in his group, regardless of the name on the ticket (R. 28, 88). Schmidt, his drinking companion, testified that a vehicle with a trip ticket issued for official business was also used for recreation (R. 19, 88). Army Regulations, however, pro-

By means of this trip ticket, Seabourn obtained the vehicle and he and his two companions then drove to the Enlisted Men's Club where they drank more beer as well as some champagne, and then they decided to "go for a ride" (R. 87, 28, 32–3; Fdg. IV, R. 99). Some time prior to the accident, Seabourn let his companions out of the vehicle and drove off alone (*ibid.*). There was testimony that Seabourn was then "very drunk" (R. 239, 29, 38, 52). Seabourn himself remembered nothing further until the next morning when he awoke beside a road (R. 29, 52, 87, 99).

Petitioner brought suit against the United States under the Federal Tort Claims Act (28 U. S. C. 1346 (b), 2671 *et seq.*) in the United States District Court for the Northern District of California, alleging that Seabourn was driving negligently while acting in the line of duty (R. 3). These allegations were denied in the Government's answer (R. 12). Upon trial of the case, the district court found that the accident was caused by Seabourn's negligence. The court found, however, that Seabourn was off duty and away from his base on a pass when the accident

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vide that motor vehicles may be used for official business only (A. R. 700–105, par. 26*c*, *infra*, pp. 16–17), or, by "special direction of the commanding officer," for transporting personnel in connection with "authorized, organized, and supervised recreational * * * activities" (*id.*, par. 28*b*). They provide that vehicles are to be dispatched for specific tasks (*id.*, par. 29*d*) and are to be operated only by properly dispatched drivers with valid permits (*id.*, par. 22*a*).

happened; that he had obtained unauthorized possession of the vehicle; that he was not using it for any purpose authorized by Army Regulations, but, instead, was on a frolic of his own, and therefore was not acting within the scope of his employment. R. 98–100, 86–92. Accordingly, judgment was entered in favor of the Government (R. 101–102).

On appeal, the Ninth Circuit reviewed the facts independently, made equivalent findings, and affirmed the judgment below (R. 291–293, 304; Pet. App. x–xii). In doing so, the court declared that the Tort Claims Act recognizes that the status of a soldier or sailor is different from that of a civilian employee of the Government; that federal rather than state law is paramount in determining the scope of employment; that, while principles of *respondeat superior* alone are applicable in determining the Government's liability for torts of its civilian employees, in the case of military personnel Section 2671 of the Act (*infra,* p. 16) requires additionally that the tort of the serviceman occur while acting in the line of military duty (R. 298–303; Pet. App. xix–xxvii).

ARGUMENT

1. The basic objective of the petition is to obtain a further review of what is primarily a question of fact, *viz,* whether the driver was acting within the scope of his employment when

the accident happened.[4] This issue and the underlying facts were resolved against petitioner by both courts below. The trial court found that Seabourn was clearly on a "frolic of his own," was not using the vehicle for any purpose authorized by his employer, but, instead, was using it "as he might his private automobile in seeking personal entertainment" (Pet. App. vi). The Court of Appeals, reviewing the evidence independently, found that Seabourn's use of the vehicle while off duty and while seeking personal recreation was not in furtherance of any military or other Government business, nor was he motivated by any purpose to serve the Government's interest (*ibid.*, xii); he was simply and "beyond any doubt * * * out on a wild frolic" (*id.*, xxiv). In the absence of a very exceptional showing of error, the concurrent findings of two courts below will not be reviewed by this Court. *Comstock* v. *Group of Investors,* 335 U. S. 211, 214. Here, not only is there no such showing of error, but on the contrary the record is so decisive on these facts as to preclude any different finding.

2. Both courts below applied the proper legal standard of "scope of employment". Regardless

[4] Scope of employment, like the question of negligence, is to be determined by the trier of facts. *Washington Gas Light Co.* v. *Lansden*, 172 U. S. 534, 544–545; *Hill Transp. Co.* v. *Everett*, 145 F. 2d 746, 747 (C. A. 1); *Restatement of Agency*, § 228 (2); cf. *Cardillo* v. *Liberty Mutual Co.*, 330 U. S. 469, 477–478.

of whether resort be had to federal authority or to state court decisions,[5] it is elementary that a servant's negligence will not be imputed to his master if that negligence occurs when the servant is on a frolic of his own.[6] It is everywhere recognized that liability under the doctrine of *respondeat superior* is predicated upon the fact that the servant is conducting his master's affairs; the master is therefore not responsible for the acts of the servant while the servant is pursuing only his own ends. *E. g., Standard Oil Co.* v. *Anderson,* 212 U. S. 215, 221; *Kish* v. *California*

[5] "The Tort Claims Act adopts the local law for the purpose of defining tort liability, not for the purpose of determining the relationship of the Government to its employees." *United States* v. *Sharpe*, 189 F. 2d 239, 241 (C. A. 4). The employment relationship between the Government and its employees, especially members of its armed forces, "is 'distinctively federal in character' " and is "governed exclusively by federal law" (*Feres* v. *United States*, 340 U. S. 135, 143, 146); "the scope, nature, legal incidents and consequences of the relation * * * are fundamentally derived from federal sources," and they "require uniform national disposition rather than diversified state rulings" (cf. *United States* v. *Standard Oil Co.*, 332 U. S. 301, 305–306, 307).

[6] As to federal cases, see *e. g.*, *King* v. *United States*, 178 F. 2d 320 (C. A. 5); *United States* v. *Lushbough*, 200 F. 2d 717 (C. A. 8). As to state cases, see *e. g.*, *Kish* v. *California S. Automobile Assn.*, 190 Cal. 246; *Hanchett* v. *Wiseley*, 107 Cal. App. 230; *Gousse* v. *Lowe*, 41 Cal. App. 715.

The accident in this case occurred in Guam. Sec. 2338 of the Civil Code of Guam (*infra*, p. 16) adopts the usual *respondeat superior* doctrine. *United States* v. *Johnson*, 181 F. 2d 577, 580 (C. A. 9). Decisions of the California courts are authoritative in Guam since this section is derived from the California Civil Code. *Ibid.;* Pet. App. p. x, fn. 1.

S. Automobile Assn., 190 Cal. 246, 248. Unless the servant is engaged in his master's affairs, liability will not attach to the private employer although the employer habitually allows his employee to use his vehicle or even if he purchases or maintains the vehicle entirely for the use and convenience of the employee. *Restatement of Agency*, § 238, com. b. "In other words, if the servant used the automobile of his master not in furtherance of his master's business, but for his own individual use, he is merely a borrower and the relation of master and servant not existing during the course of such use, the master is not liable for his acts." *Kish* v. *California S. Automobile Assn., supra,* 190 Cal. at 249. There is no liability under the Tort Claims Act when the government employee is only a borrower or a bailee of the government vehicle. *United States* v. *Lushbough,* 200 F. 2d 717 (C. A. 8); see *United States* v. *Hull,* 195 F. 2d 64, 67 (C. A. 1).[7]

[7] Thus, petitioner's contention that Seabourn had "permission" to use the vehicle is wholly irrelevant once it is found that he was using the vehicle for his personal use rather than to further his master's affairs.

Even though a servant's recreational activities may be of indirect benefit to his master (presumably every employer wants his employees to be healthy and to have high morale), if those activities are not controlled by the master and have no substantial relation to the servant's duties in furthering the master's business, no liability attaches to the master for injuries to third parties resulting from such recreational activities. *Matter of Wilson* v. *General Motors Corp.*, 298 N. Y. 468; *Harrington* v. *Border City Mfg. Co.*, 240 Mass. 170; *Rogers* v. *Allis-Chalmers Mfg. Co.*, 153 Ohio St. 513.

Accordingly, if we accept petitioner's contention that in measuring the Government's liability for the torts of its military personnel the normal master-and-servant principles apply without reference to the "line of duty" concept,[8] it is plain that the elementary rules of *respondeat superior,* coupled with the finding of both courts below that Seabourn was not engaged in government business but was on a frolic of his own, is completely dispositive of petitioner's claim. Neither in principle nor in result does the decision below depart from this rule. On the contrary, it was expressly accepted.[9]

3. The court below did go further. It suggested that, to impose liability upon the United States for the negligence of its military personnel, the Act requires not only that they be acting within the scope of employment under *respondeat superior* principles, but also that they be acting in

[8] As noted above, the Tort Claims Act provides that, as to military personnel, scope of employment "means acting in line of duty" (Section 2671, *infra*, p. 16).

[9] The appellate court said (Pet. App. xxiv–xxv): "Reduced to their simplest terms, the facts of this case show beyond any doubt that Seabourn was out on a wild frolic when he injured appellant; * * * that he was not then * * * on military business of any kind. And if resort be had to the California cases * * * which deal with the liability of a private employer (under the respondent superior doctrine) we suggest that it would bankrupt the most exuberant imaginative powers to envision Seabourn's criminal conduct as an activity which a private employer 'should reasonably have expected would be done,' or that such conduct was 'serving his master.'"

line of military duty.[10] Petitioner urges that the addition of this "line of duty" qualification conflicts with *United States* v. *Campbell,* 172 F. 2d 500 (C. A. 5), certiorari denied, 337 U. S. 957.[11] But since the decision below barring recovery falls decisively within, and was also based upon, normal *respondeat superior* principles, wholly apart from the added qualification (see *supra,* pp. 6–9), it is unnecessary to reach the purported point of conflict.

In any event, the *addition* of a limiting military qualification is not inconsistent or in conflict with *Campbell.* There, the claimant had relied upon

[10] That the court below regarded the "line of duty" proviso of Sec. 2671 as an added requirement rather than as a substitute for "scope of employment" is apparent from the whole tenor of the opinion. Thus, it spoke of the "line of duty" concept as a "modification of" the master and servant doctrine rather than as its replacement (Pet. App. xxii–xxiii); however, it tested Seabourn's conduct by normal *respondeat superior* rules, examining the purpose of his trip, his personal motive, the absence of his employer's supervision and control over his conduct, etc. (see *id.*, xxii, xxv–xxvii). See, *e. g.*, fn. 9, *supra*, p. 9.

[11] The other cases mentioned by petitioner do not discuss the "line of duty" proviso. *Costley* v. *United States*, 181 F. 2d 723 (C. A. 5), related to the discretionary function exception of the Act; *Hubsch* v. *United States*, 174 F. 2d 7 (C. A. 5), certiorari dismissed, 340 U. S. 804, involved primarily an evidentiary problem and the "permissive use" doctrine; *McConville* v. *United States*, 197 F. 2d 680 (C. A. 2), certiorari denied, 344 U. S. 877, involved a personal deviation from an authorized and official trip. Compare cases in fin. 13, *infra*, p. 12.

the "line of duty" concept for the purpose of *extending* the Government's liability for the conduct of military personnel beyond the bounds of normal *respondeat superior* principles. It was argued that the words "line of duty" should be given the same broad interpretation under the Tort Claims Act as they are given in statutes conferring benefits on servicemen and their dependents for an injury or death incurred during the serviceman's military service.[12] The Fifth Circuit rejected that argument, stating that its acceptance would "subject the Government to fantastic claims of liability having no relation to the doctrine of respondeat superior, as it is known and applied, in determining the liability of private persons" (172 F. 2d at 503).

[12] Congress has broadened the "line of duty" concept in such legislation to reward servicemen for the sacrifices caused by their separation from civilian life, and for the understandable and desirable purpose of making benefit payments to such servicemen and their dependents in practically all situations, except where the injury or death for which benefits are claimed (1) was the proximate result of the serviceman's own misconduct or (2) occurred while he was deserting or was under confinement by sentence of a court. See Act of September 27, 1944, 58 Stat. 752; 32 Op. A. G. 12 (1919). Thus even injuries sustained by a soldier in the course of his remunerative employment for a private concern while he was on furlough from his military duties have been held to have been incurred in the "line of duty" for the purpose of awarding him pension benefits (Decisions of the Administrator of Veterans' Affairs, Vol. I, p. 147).

The *Campbell* decision is representative of a group of cases[13] which recognize that Congress did not intend to incur *broader* liability when the injurious act was inflicted by a serviceman than when due to the wrongful conduct under similar circumstances by other kinds of federal employees. The decision below, on the other hand, suggests in its alternative holding that the liability may perhaps be *narrower, i. e.,* in those circumstances where the serviceman is not acting in strict line of military duty, even though were he a civilian employee he might be regarded as within the scope of employment. *Campbell* and the other cases (fn. 13) do not touch this proposition.

4. Nor does the decision below present an intra-circuit conflict with *Murphey* v. *United States,* 179 F. 2d 743 (C. A. 9), involving an accident which occurred during a soldier's recreational trip. In that case, pursuant to Army Regulations 700–105, par. 26*c* (*infra,* pp. 16–17), the vehicle had been assigned by special direction of the commanding officer for an organized and supervised recreational activity; here, on the other hand, Seabourn's use of the vehicle during his entire trip was without any Army sanction, and, instead, as both courts below found, was for a frolic of his

[13] *E. g., United States* v. *Eleazer,* 177 F. 2d 914, 918 (C. A. 4), certiorari denied, 339 U. S. 903; *Rutherford* v. *United States,* 168 F. 2d 70 (C. A. 6), affirming *per curiam* 73 F. Supp. 867 (E. D. Tenn.).

own.[14] Neither the *Murphey* decision nor the seamen cases on which it relied compel the conclusion, which petitioner urges (Pet. 16), that a soldier's personal pursuit of pleasure in an army vehicle while he is off duty on a pass is, as a matter of law, within the scope of army employment.[15] While off duty, a soldier "is at liberty to go where he will" and "to employ his time as he pleases" (*United States* v. *Williamson,* 23 Wall. 411, 415); he is "subject to the control of no one but himself" (*United States* v. *Sharpe,* 189 F. 2d 239, 241 (C. A. 4)); his relationship to the Government while off duty is "not analogous to that of a soldier * * * performing duties under orders" (*Feres* v. *United States,* 340 U. S. 135, 146).

[14] In *Murphey* the court said (179 F. 2d at 745–746): "We are not holding that in any case where the soldier is on a frolic of his own he can make the government liable simply because he there found entertainment." As the court below pointed out (Pet. App. xvii), the instant case falls within this area excluded by *Murphey.*

[15] In *Murphey,* the court relied (erroneously, we submit) on cases such as *Aguilar* v. *Standard Oil Co.,* 318 U. S. 724, which hold that, for purposes of determining whether the owner of a vessel is liable to a seaman for wages, maintenance, and cure when the seaman is injured ashore, shore leave is to be regarded as "not merely a personal diversion," but as part of the business of sailing of ships (*ibid.* at 734). This type of case is based upon historic and unique admiralty doctrine—the seaman is a "ward of the admiralty" (*Isbrandtsen Co.* v. *Johnson,* 343 U. S. 779, 782)—and has no relevance to the question of the owner's liability to a third person for the torts of his seamen. That liability is controlled by the doctrine of *respondeat superior* (see *Workman* v. *New York City, Mayor, etc.,* 179 U. S. 552, 565).

So far as third persons were concerned, Seabourn was, while off duty, virtually in the same relationship to the Government as any private servant is to his private employer on his day off. As we have pointed out, the law does not recognize vicarious liability in those circumstances.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1954.

APPENDIX

A. Sections 1346 (b), 2674 and 2671 of Title 28 U. S. C. (the reenactment of the Federal Tort Claims Act, 62 Stat. 933, 982, 983), provide in pertinent part:

SECTION 1346. *United States as defendant.*

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

SECTION 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

SECTION 2671. *Definitions.*

As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term—

* * * * *

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.

B. Section 2338 of the Civil Code of Guam provides as follows:

2338. Unless required by or under the authority of law to employ that particuiar agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal.

C. Army Regulations 700–105 (30 June 1948) provide in pertinent part as follows:

26. *Use of vehicles.*—* * *

b. Motor vehicles * * * will be operated * * * only if properly dispatched on WD Form 48 (Drivers' Trip Ticket and Preventive Maintenance Service Record), issued by the dispatching motor pool or under such instructions as the appropriate

commander under existing authority may direct.

c. Motor vehicles will be used only for official business, including the special uses listed in paragraph 28.

* * * * *

28. *Special uses.*—Motor vehicles, when available without detriment to other official business * * * may be used by special direction of the commanding officer for the following purposes:

a. Authorized athletics.

b. Transporting personnel, including entertainers and party guests, and supplies and equipment in connection with authorized, organized, and supervised recreational, welfare, and morale-building activities.

* * * * *

29. *Motor pools.*—* * *

d. Vehicles will be dispatched from pools to perform specific tasks, and will not be permanently allocated or assigned to any agency or individual, except as prescribed herein.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 470

ALTHEA G. WILLIAMS,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S OPENING BRIEF ON THE MERITS.

OPINIONS BELOW.

The memorandum opinion of the United States District Court for the Northern District of California, Southern Division (R. 44) is reported at 105 F. Supp. 208. The opinion of the Court of Appeals for the Ninth Circuit (R. 168) is reported at 215 F. 2d 800.

JURISDICTION.

The judgment of the Court of Appeals was entered on Septemebr 8, 1954 (R. 167). The petition for a writ of certiorari was filed on December 6, 1954. The order granting certiorari was filed January 31, 1955 (R. 183). Jurisdiction of this Court is invoked under 28 *U.S.C.* 1254(1).

STATUTES INVOLVED.

Sections 1346(b), 2674 and 2671 of Title 28 *U.S.C.* (the reenactment of the Federal Torts Claims Act, 62 Stat. 933, 982, 983) provide in pertinent part:

> Section 1346. United States as defendant.
>
> * * * * * * *
>
> (b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
>
> * * * * * * *
>
> Section 2674. Liability of United States.
>
> The United States shall be liable, respecting the provisions of this title relating to tort claims,

in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * * * *

Section 2671. Definitions.

As used in this chapter and sections 1346(b) and 2401(b of this title, the term—

* * * * * * *

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

QUESTIONS PRESENTED.

1. Is a United States soldier, stationed at an overseas United States governmental facility on Guam, "acting in line of duty" within the meaning of the Federal Tort Claims Act, where his Army superiors give him a pass, an Army vehicle and a trip ticket for recreational purposes, and which he uses for such purposes in accordance with the long-established Army practice at such overseas station?

2. Do federal law and federal administrative regulations, or does the law of the place where an alleged tort is committed, apply in determining whether a member of the armed forces is "acting in line of duty" within the meaning of the Federal Tort Claims Act?

3. Was the term "acting in line of duty" intended by Congress to restrict federal liability under the Federal Tort Claims Act to a smaller area of liability than that of a private individual under normal principles of *respondeat superior?*

4. Since the sole evidence on the issue of scope of employment was documentary, may this Court review the evidence and make its own determination of that issue?

STATEMENT OF THE CASE.

Petitioner filed her complaint in the District Court under the Federal Tort Claims Act to recover damages for severe and painful permanent injuries sustained through the negligent driving of a United States Government vehicle by a soldier on the Island of Guam (R. 1). Petitioner contends that the soldier was acting within the scope of his employment at the time of the accident. The respondent United States filed an answer denying all allegations as to negligence, scope of employment, causation, injuries, and amount of damages (R. 6).

Prior to filing its answer, respondent moved for a summary judgment on the grounds that the soldier

at the time of the accident was not acting in the line of duty nor in the course of employment by the United States (R. 3).

Reference was made in the motion to records on file in respondent's San Francisco office. Petitioner filed her affidavit in opposition to the motion, stating that at the trial she would develop the liability of respondent based upon these facts: The vehicle driven by the soldier and which caused injuries to plaintiff was an Army weapons carrier owned by the respondent. There had been delivered to the soldier, for recreational purposes, a pass and a trip ticket issued for the vehicle, permitting him to drive respondent's vehicle. This covered the driver with an authorized recreational status. Such status was in the interests of respondent for morale maintenance. In accordance with the procedure in effect at the time and place, the trip ticket and the permission of respondent to drive the vehicle assumed that the recreational driving at the said time and place was in the nature of authorized Army activities. Respondent had clothed the soldier's driving with official sanction and had granted him express permission to drive the vehicle. His trip in that sense was actually official business (R. 4).

The District Court, after hearing, denied respondent's motion for summary judgment (R. 4-5).

The evidence at the trial was as follows:

The accident occurred on the evening of March 3, 1949 at about 10:30 o'clock P.M. (R. 58). Petitioner plaintiff was sitting in another U. S. Army vehicle,

parked at the end of the Breakwater Road at the town of Agana on the Island of Guam (R. 58). Plaintiff's vehicle was struck by a ¾ ton Army weapons carrier being driven by Corporal Joe Seabourn of the United States Army (R. 61). Petitioner was seriously and permanently injured (R. 35-36, 39-40).

Soldiers stationed on Guam technically were on duty 24 hours per day (R. 30). At the time of the accident, Seabourn was a supply clerk stationed on Guam with a service detachment (R. 27). In the performance of his duties, he occasionally drove an army weapons carrier (R. 27). On March 3, 1949, he had been issued an Army operator's permit for any vehicle up to 2½ tons (R. 27).

About 8:00 A.M. on the day of the collision, Seabourn, while on pass (R. 27), and two other soldier buddies, also on pass—Sgt. Vincent and Pfc. Schmidt —went to a tavern about a mile from Harmon Field and spent most of the morning drinking (R. 132). In the afternoon, the three hired a cab and went about Agana, drinking, until 6:30 P.M. when they returned to the base (R. 132).

At 8:00 P.M. Seabourn went to Sgt. Stiles of his company and obtained an official "trip ticket" for a ¾ ton weapons carrier assigned to the 374th T.C.W. (R. 129, 28). The trip ticket was good for that vehicle until 9:30 A.M. the next day. (It was made out to Pfc. Carbera) (R. 28).

Seabourn and his companion, Pfc. Richard Schmidt, both testified that trip tickets in service stock always

were passed around between the men working in that section regardless of the name of the individual to whom the trip ticket was made out (R. 126). This was the usual procedure (R. 127); and it applied whether the vehicle was to be used for work or recreation. Vehicles were necessary for recreational purposes in view of the distances on Guam between station points and recreational facilities (R. 127). All officers and enlisted men in Seabourn's unit followed the practice of thus circulating trip tickets (R. 131).

Seabourn's superior officers had jeeps and the enlisted men used weapons carriers, as Seabourn did on the night of the collision (R. 131).

The practice had prevailed on Guam for at least fifteen months prior to the accident (R. 130).

Having obtained the official trip ticket authorization at 8 p.m. on the day in question, the proper Army authorities at the motor pool gave Seabourn the weapons carrier (R. 128). After this, he and his two companions, driving the vehicle, checked out of the base in the usual manner and went to the official Army NCO Recreational Club and to Agana (R. 128). Neither Schmidt nor Vincent drove the carrier. They left Seabourn before the collision (R. 132).

The District Court for the Northern District of California Southern Division, found that petitioner suffered severe bodily injuries as a result of the accident; that the accident was entirely due to the negligence of the soldier; that the soldier was, at the time of the accident, off duty; that the soldier had obtained

unauthorized possession of the vehicle; that the soldier's use of the vehicle was not for a purpose authorized by his commanding officer; that the soldier was merely off on a frolic of his own; and the Court concluded that the soldier, an employee of respondent, was not acting within the course and scope of his employment (R. 50).

The Memorandum Opinion, filed by the Honorable Judge Roche on June 4, 1952, contains an erroneous statement of fact. The opinion states (R. 45):

> "On the other hand Sgt. Stiles states that the vehicle was to be used for official business only; that because the vehicle was on 24 hours dispatch and was used officially by all men in the Section who had permits; that it was good on the post only."

This statement is based on the affidavit of Sgt. Stiles (R. 155). But this affidavit was admitted subject to a motion to strike, which motion was granted (R. 48).

An important portion of the memorandum opinion follows:

> "Even assuming that the practice testified to by Seabourn and Schmidt was known and permitted by the officers in charge, it would not make the United States liable. . . . By the Tort Claims Act the United States has consented to be sued for the negligence of its employees only when they are acting within the scope of their employment which, in the case of military personnel, means acting in the line of duty. *To determine whether the person inflicting the injury was an employee*

so acting, we look to Federal law and decisions . . ." (R. 45.) (Emphasis supplied.)

On October 22, 1952, judgment was entered for respondent. On November 21, 1952 petitioner filed her Notice of Appeal (R. 53). On September 8, 1954 the Ninth Circuit filed its opinion, affirming the judgment below (R. 168). Important portions of this opinion follow:

"We disagree with appellant's contention that our decision in Murphey v. United States, supra, when laid off against the facts revealed by the record before us, is dispositive of the vital and controlling issue in the instant case. We are fully persuaded that the Murphey case is clearly distinguishable on the facts . . ." (R. 174.)

* * * * * * *

"As we point out herein, one important problem was met and disposed of by a specific provision in the Act which carefully delimited the area of federal liability for a tortious act of (as here) a soldier, by providing that such liability would attach *only* when the act was committed while the soldier was 'acting in the line of [military] duty.' This careful delineation provides a clear line of demarcation between Government liability for a soldier's torts and the area of general liability of a private employer for torts of his employees in classical 'master and servant' cases where the rule of respondeat superior is normally applied . . ." (R. 177-178.)

* * * * * * *

". . . as to . . . civilian employees, the familiar doctrine of respondeat superior, as it has been

applied under California law to the commonplace 'master and servant' cases, would apply.

"But in dealing with the problem of federal liability for tortious acts of members of the military and naval forces a wholly different situation is presented because Congress saw fit to adopt a drastic modification of this 'master and servant' doctrine . . ." (R. 178-179.)

* * * * * * *

SUMMARY OF ARGUMENT.

Both the trial court and Court of Appeals erroneously have held that the issue of scope of employment of a soldier is to be determined by federal laws and regulations. This error led the trial court to disregard petitioner's evidence of the custom and practice on Guam with respect to recreational use of army vehicles. The mistake of the Court of Appeals was even worse. It not only disregarded the evidence, but, finding erroneously violations of army regulations, i.e., federal regulations, concluded that acts pursuant to custom and practice automatically placed such acts outside the scope of the soldier's employment. This latter conclusion also followed from a novel and erroneous construction of the Tort Claims Act. The Ninth Circuit herein has held that while the substantive law of *respondeat superior* applies with respect to civilian personnel of the government, it does not apply in fixing liability for acts of members of the armed forces. It bases this error on the fact that Congress used the term "line of duty" as a definition of the

"scope of employment" of soldiers and that by the use of said term Congress intended to abandon *respondeat superior* in favor of some more restricted theory.

Petitioner contends, however, that the Tort Claims Act explicitly provides that the United States shall be liable under the same circumstances where a private employer is liable, and expressly incorporates the substantive law of the state where the tort is committed. These provisions mean that the issue of scope of employment is to be determined by the rules and tests of conventional *respondeat superior*. This Court and other courts have so declared. A contrary interpretation also violates the rule of this Court that the Tort Claims Act is to be liberally construed.

Furthermore, if the use of the term "line of duty" has any significance, it is that Congress recognized that governmental liability for acts of soldiers may be *broader* than for civilian personnel, since that term has had a long and technical military significance whereby many acts traditionally considered outside the scope of employment of civilians have been held in military circles to be "in line of duty". And while federal law, of course, applies in determining the nature and incidents of federal employment between the government and its employees, this would be so as to any type of federal employee, *but only inter sese*, not in determining the issue of scope of employment, *i.e.*, liability of the government in relation to third persons. To so apply federal law under the Tort Claims Act would result in incongruities ob-

viously not intended by Congress. Here, and in other cases where custom and practice in conflict with federal regulation have been held not to affect the regulated "authority" of a soldier, the result is that the government escapes liability upon legal fiction rather than fact. Congress did not intend to adopt the state substantive law of *respondeat superior* for one class of employees and to create, since *Erie v. Tompkins,* a new federal common law of *respondeat superior* for another class.

If normal rules and tests of *respondeat superior* are applied to the evidence in this case, governmental liability is clear in at least three of the following alternatives:

First, the specific act of *driving* the army vehicle *itself* was an authorized act. The recreational use of an army vehicle by a single soldier has been correctly held in *Murphey v. U. S.,* 179 F. 2d 743, to be an act in furtherance of a governmental purpose, where, like here on the small, remote, overseas post of Guam, the relief of monotony and the improvement of morale is of prime governmental concern. This meets the ultimate test of scope of employment—serving the master's purpose. And even army legal decisions on the issue of scope of employment recognize this rule. Furthermore, the soldier-driver here at all times was under the control and subject to the right of control by the military, even while on pass. This meets the ultimate test of liability under *respondeat superior.* And since the specific authorized act was driving the army vehicle for recreation, the

fact that the driving was being done negligently or while in an intoxicated condition does not place the act outside the scope of employment. This is not the traditional "frolic" situation. Instead, an authorized act namely, driving the Army vehicle, was done negligently. The mere fact that the authorized act was done in a wrongful or prohibited manner does not preclude responsibility under *respondeat superior.*

Second, even if the soldier-driver's authority were deemed restricted to the use of the army vehicle for driving to and from the government-provided recreational facility, the N.C.O. club, still his acts were within the *scope* of employment. This situation is the same as in *Murphey v. U. S.,* supra, and if the driver in that case was not on a frolic of his own, then neither was the driver here. The cases are not distinguishable.

Third, even if the soldier-driver may not have been acting in "line of duty" in negligently or drunkenly driving the army vehicle into petitioner, then at least the dispatcher in issuing to a drunken soldier the vehicle in question was acting in "line of duty" and his commanding officer, Lt. Werb, in authorizing the use was acting in "line of duty". Their acts in so doing should create liability. The ultimate test of vicarious liability is whether it is just that the employer or the person injured should bear the loss. Here petitioner was seriously injured and disabled for life. The entire practice of issuing to soldiers vehicles for driving to and from a recreational facility, where drinking is done; in, specifically, issuing to a soldier

who had been drinking all day a vehicle for the purpose of going to a place of additional drinking, is such an entire tortious transaction, clearly within the Government's power to prevent, as to make it just that petitioner recover.

Proof of each of the three alternative bases of liability grounded on actual authority lies in petitioner's evidence of custom and practice. Evidence of custom under state law is relevant in determining whether an act is contemplated by the employment. Under the applicable California law actual authority is defined as that which a principal by want of ordinary care allows the agent to believe he possesses. The army itself, in legal determinations of "scope of employment," looks to evidence of custom, even when it conflicts with standing orders. And in the latter respect, the conclusion of the Ninth Circuit that the so-called "loose post practice" violated army regulations and made the driving for recreation unauthorized, is also wrong. Army regulations vested in Lt. Werb, the soldier-driver's superior, the authority to allow recreational use of vehicles in connection with organized and supervised morale-building activities. As in *Cannon v. U. S.*, 188 F. 2d 444, the lieutenant's authorization of a practice to transport soldiers to and from the N.C.O. club was a "in line of duty" factual determination. Such regulation was held applicable, and the act of so driving was held authorized. Such a finding makes the act itself authorized, or "in line of duty", under the rule of that case, even though the finding is incorrect. And the mere recreational driv-

ing of a single soldier may well be considered "incidental" to such an authorized act.

Since the evidence above is uncontradicted and appears in depositions of United States witnesses, this Court can and should determine in petitioner's favor, for itself, the issue of scope of employment and remand to the trial court the issue of damages.

ARGUMENT.

I. CONGRESS INTENDED THAT THE LAW OF RESPONDEAT SUPERIOR, APPLICABLE TO PRIVATE EMPLOYERS IN THE STATE WHERE THE TORT IS COMMITTED, SHOULD APPLY IN DETERMINING THE ISSUE OF SCOPE OF EMPLOYMENT OF MEMBERS OF THE ARMED FORCES. THE CONTRARY HOLDINGS OF THE COURT BELOW SHOULD BE DISAPPROVED AND THE JUDGMENT REVERSED.

Throughout the course of the instant litigation petitioner has insisted steadily that the authorized pursuit of recreation with government provided facilities may be activity within the scope of authority or line of duty of members of the armed forces. Petitioner has relied on direct authority to that effect,—*Murphey v. U.S.*, 179 Fed. 2d 743 (9th Cir. 1950).

Petitioner has been met in the Courts below, however, by two apparently inconsistent positions. On the one hand, the lower Courts have found distinctions between the instant case and the *Murphey* case. But as petitioner pointed out below, no real distinction exists between them.

Actually, it is the second position which indicates a more fundamental error. This position is that the

definition in Sec. 2671 of the Tort Claims Act (that course of employment means "acting in the line of duty" with respect to soldiers) was intended by Congress to relieve the government of liability in situations where private employers in similar situations might nevertheless be liable. Spelled out, it would mean that in determining whether a soldier is "acting in line of duty," *federal* law and *federal* regulations shall control without regard to orthodox principles of *respondeat superior.*

Because the evidence is uncontradicted, the Courts below in accord with this second position, thus held have *as a matter of law:* (1) The authorized practice on Guam of military personnel passing around trip tickets for recreational use of vehicles is *irrelevant* to the issue of scope of employment; (2) The fact that such practice authorized on Guam violated certain Army Regulations conclusively determines that activity pursuant to such practice is outside the scope of employment; (3) Any activity contrary to Army Regulations, i. e. federal law and decisions, such as drunk-driving, *ipso facto* is activity outside the scope of employment.

Petitioner contends that such interpretations of the Act, being contrary to rules of *respondeat superior,* violate a clear congressional intent, and the failure to follow a correct interpretation has left petitioner's case still factually undecided.

A. By the Express Terms of the Act, Congress Intended That the United States Shall Be Liable in the Same Manner and to the Same Extent as a Private Individual Under Like Circumstances. Congress by This Declaration, and by Providing What Law Shall Apply, Made Known Its Intention to Impose Liability Upon the Government Under Respondeat Superior and Not Under Some Restricted Theory.

Section 2674 of the Act provides:

> "The United States shall be liable respecting the provisions of this title relating to tort claims *in the same maner and to the same extent as a private individual under like circumstances,* but shall not be liable for interest prior to judgment or for punitive damages."

What clearer declaration of intention could there be? This section means just what it says. If under rules of *respondeat superior,* as applied to the circumstances of the case, a private employer would be liable, the government shall be liable. This is further borne out by the requirement of Sec. 1346 of the Act:

> "The District Court . . . shall have jurisdiction of civil actions on claims against the United States, for money damages . . . for personal injury or death caused by the negligent . . . act . . . of *any* employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant *in accordance with the law of the place where the act or omission occurred.*"

The only possible reference that the last quoted portion could have is to the practically universal rules of *respondeat superior, not federal law.*

Petitioner, however, need not rely solely upon the plain meaning of this statute. These phrases have been judicially construed. In holding that the government was not liable *under this Act* for injuries to servicemen arising out of or in the course of activity "incident to service", this Court has stated:

> "Jurisdiction of the defendant now exists where the defendant was immune from suit before; it remains for courts, in exercise of their jurisdiction, to determine whether any claim is recognizable in law."
>
> "For this purpose, the Act goes on to prescribe the test of allowable claims, which is, 'The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . .' It will be seen that this is not the creation of new causes of action but *acceptance of liability under circumstances that would bring private liability into existence* . . ."
>
> * * * * * * *
>
> "It is not without significance as to whether the act should be construed to apply to service-connected injuries that it makes '. . . the law of the place where the act or omission occurred' govern any consequent liability . . . *This provision recognizes and assimilates into federal law the rules of substantive law of the several states* . . ."
>
> (Emphasis added).
>
> *Feres v. U.S.*, 340 U.S. 135, 71 S.Ct. at 157.

As the Court said in *Capital Transit Co. v. U. S.*, 183 F. 2d 825, at 829:

> "The reference to liability merely means that the *same substantive law* should govern the question

whether an employee of the United States had committed a tortious act for which the United States was responsible and that the same measure of damages should be applicable, as if the United States were a private party. Sen. Rep. No. 1400, 79th Cong., 2d Sess., p. 32."

It is, therefore, clearly apparent that Congress intended the substantive law of *respondeat superior* to govern its liability in all tort claims, and not some restricted theory.

B. The Use of the Term "Line of Duty" Is Significant Only Insofar as It May Be a Conscious Congressional Recognition That Governmental Liability for the Acts of a Soldier May Be Broader Than for Acts of Civilian Personnel. The Required Liberal Construction Should Give It This Effect.

Respondent argued before the Ninth Circuit that the government's liability for the acts of a soldier is *limited by the doctrine of respondeat superior.* Quoting from its brief:

". . . this provision of the Act was not designed to put military personnel into a separate category as to which there would be different standards of liability. The purpose was just the opposite—the provision was designed to place the military in the same category as civilian personnel . . ."

The Ninth Circuit, however, held (R. 179):

". . . as to . . . civilian employees, the familiar doctrine of respondeat superior, as it has been applied under California law to the commonplace 'master and servant' cases, would apply. But in dealing with the problem of federal liability for tortious acts of members of the military and naval forces a wholly different situation is pre-

> sented because Congress saw fit to adopt a drastic modification of this 'master and servant' doctrine. . . ."

The Court then holds, without citation of authority, that the "plain meaning" of "line of duty" *restricts* governmental liability for torts of soldiers. This gratuitous conclusion is wrong.

Petitioner contends that the same substantive law of *respondeat superior*—the same rules, tests and distinctions—apply to the tort of a soldier as to the tort of a civilian employee. As the Court said in *Hiroshima v. Pac. Gas & Elect. Co.*, 18 C.A. 2d 24, at 30, quoting from a text:

> "Expressions equivalent to scope of employment are, line of duty. . . ."

This is the view of the Fifth Circuit. In dismissing the tort claimant's argument that "line of duty" *broadened* the liability of the government, the Court held:

> "Such a construction would be to give to the phrase, 'within the scope of his office or employment' not one consistent meaning throughout the act, but two inconsistent meanings, one of these applying to acts of all government employees except members of the armed forces, would subject the United States to liability to third persons for acts of its employees only as and to the same extent that a person in private employment would be liable under the law of the state where the accident occurred. The other, applying to acts of military personnel would subject the Government to fantastic claims of liabil-

> ity having no relation to the doctrine of respondeat superior, as it is known and applied, in determining the liability of private persons. It would do this, too, in the face of the known purpose of the Tort Claims Act, as shown by its antecedent history, and the record made in its passage, to make the United States liable to third persons for the acts of its employees under the same circumstances, and no other, as those under which private persons would be liable for the acts of their employees according to the law of the place where the injury occurred."
>
> *U. S. v. Campbell,* 172 Fed. 2d 500, 503.

Petitioner additionally contends, however, that if there is any other significance to the use of the term "line of duty" it is that Congress recognized the term does *broaden* the liability for acts of members of the armed forces. For this term has had a long and *liberal* construction in military law. And in the absence of explicit language showing contrary congressional intent, technical words in statutes must be given their usual technical meaning. *Barber v. Gonzales,* 347 U.S. 537.

Thus Army Regulation 600-140 provides in part:

> "(c) Presumptions—Injury, disease or death incurred by a member of the Army while in active duty, or engaged in authorized training in inactive status will be *presumed* to have been incurred *in line of duty* and not because of the member's own conduct." (Emphasis added.)

And interpretations by the Judge Advocate General illustrate the liberality in construction of this

phrase. Thus, injuries from a motor vehicle accident suffered by soldiers while on pass may be incurred "in line of duty". Op JAGN 1952/95, 23 January 1952. Death while hitchhiking may be in "line of duty". Op JAGN 1952/86. Failure of a motor vehicle driver to have a driver's license and proper tags on his motor vehicle did not prevent a determination of line of duty in Op JAGAF 1953/35, 21 September 1953.

But regardless of the technical or non-technical meaning of the phrase "line of duty", the approach of the 9th Circuit in delineating a *narrower* liability in the case of members of the armed forces, clearly conflicts with the approach of this Court. In *U. S. v. Yellow Cab Co.,* 340 U.S. 543, 71 S.Ct. at 492 this Court said:

> "The Federal Tort Claims Act waives the Government's immunity from suit in sweeping language. It unquestionably waives it in favor of an injured person. . . ."

In holding that the Act covered claims for contribution, this Court, based upon those broad words of waiver, held that the Act should be liberally construed. The Court reviewed the legislative history of the Act, and concluded in footnote 8 that the trend of that history was one of broad lines of waiving immunity. Certainly the Ninth Circuit has disregarded this trend in the instant case.

C. The Substantive Rules of Respondeat Superior of the State Where the Tort Is Committed, Not Federal Law and Decisions, Determine Whether an Act Is Committed Within the "Scope" of Employment of a Soldier.

As set forth in the Statement of the Case hereto, the District Court held that whether the person inflicting injury was an employee "so acting" within the scope of his employment is determined by federal law and decisions (R. 45). The Ninth Circuit likewise so held on the ground, *inter alia,* that it is a question of construction of federal legislation (R. 178). Petitioner contends that the statutory adoption of state rules of *respondeat superior* necessarily makes these holdings invalid.

Both lower courts have loosely analyzed the case. Actually there are two distinct questions involved here. One is the actual employment, the rights and duties, of the government and employees, *inter sese.* The other is the "scope" of their employment *in relation to third party claimants.*

> "a. The word 'employment' means the subject matter as to which the master and servant relationship exists. The words 'scope of employment' mean the extent of this subject matter and denote the field of action within which one is a servant."
>
> Restatement of the Law-Agency, Sec. 228, Comment a.

The lower courts have followed *U. S. v. Standard Oil Company of Calif.,* 332 U.S. 301, and *Feres v. U. S.,* 340 U.S. 135, and have concluded in accord with language therein that the issue of "scope" of

employment of governmental military personnel is one governed by federal law. No adequate reason is given why this would not also be as true of civilian personnel as military personnel.

It is apparent, however, that this Court in those cases was speaking of rights and duties between the government and members of the armed forces *inter sese*. The Court must not have contemplated the use of these cases to read out of the Tort Claims Act the provision on what law is to apply in actions under the Act. This is illustrated by a review of the actual questions involved in each of them. In the former case the question was whether the government might, in the absence of statute, sue for indemnification from defendant for the expense of care of a soldier injured by defendant's truck. This Court said that any liability would have to be determined by federal statute, and there was none. In so doing the Court made this statement:

> "To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority."
>
> 67 S.Ct. 1607.

This language is quoted in *Feres v. U. S.*, 67 S.Ct. at 158, in a case involving the liability of the government to a soldier, likewise rights and duties, *inter*

sese. Neither holding deals with scope of employment. Neither holding deals with the vicarious liability of the government to third persons. In fact, the language in the *Standard Oil* case suggests that the scope of the relation of soldier to civilian may not be governed by federal law. In any event, it is clear that federal laws and regulations do not, *under the Tort Claims Act,* control the determination of scope of employment of soldiers. The Act provides, and petitioner contends, that state rules of *respondeat superior* must govern.

The danger of a contrary holding is amply illustrated by the case at bar, and also by *Watt v. U. S.,* 123 F. Supp. 906 (E.D. Ark. N.D. Sept. 13, 1954), and *McConville v. U. S.,* 197 F. (2d) 680 (2d Cir. 1952). Each of these cases results in a holding contrary to practically universal substantive law of *respondeat superior.*

In the case at bar the lower courts refused to consider the effect of petitioner's evidence that the soldier-driver here followed the prevailing custom, the usual channels, the standard operating procedure, in seeking personal recreation by driving the vehicle and also by driving to and from a non-commissioned officer's recreational club, by obtaining an official pass for recreation, by obtaining the usual military vehicle trip ticket, by obtaining the vehicle from the motor pool, and by checking out the vehicle at the dispatcher's office when he left the base. Finding that this procedure and custom violated another army regulation, the courts refused to consider these factors

in determining whether the soldier was acting in the course of his military employment; or, considering the violation, found that it was conclusive on the issue. But, as is more fully developed below, either alternative was unwarranted.

Some of the tests under the substantive law of respondeat superior for determining the issue of scope of employment are: (a) whether or not the act is "one commonly done" by such servants; (b) the "previous relations" between the master and the servant; (c) whether or not the master has "reason to expect that such an act will be done;" (d) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant; (e) the extent of departure from the "normal method" of accomplishing an authorized result. *Rest. Agency,* Sec. 229. Petitioner's evidence, of course, pertained to and more than fully met some, if not all, of such tests.

The danger and inequity of holding that these cases are governed by federal rules and regulations, and of disregarding evidence of custom is graphically illustrated by the other two recent cases. In *Watt v. U.S.,* 123 F. Supp. 906 (E.D. Ark. N.D. Sept. 13, 1954) a national guard company's "unit administrative assistant" drove a truck to the headquarters of a United States property disbursing office for the purpose of delivering to him clothing formerly issued to the company and to draw additional supplies and equipment. This was obviously a governmental purpose. His passenger was the "unit caretaker" of the

company. Both were sergeants first class. Had the passenger been driving the truck, there would have been no question but that he was acting within the scope of his employment. But, the Court found that certain compartmentalizing regulations of the army prescribed different administrative duties for the driver. The Assistant Adjutant General for Arkansas testified, nevertheless, that the duties of an "administrative assistant" and "unit caretaker" customarily overlapped in *practice*. But the Court held that the *regulations* were the boundaries of the driver's scope of employment, that the usage and custom of the driver's unit would not extend the scope of the driver's employment. In *McConville v. U. S.*, 197 F. 2d 680 (2d Cir. 1952) a result was reached quite opposite to the result reached by the Ninth Circuit below, and yet there were very similar facts. In that case the government proffered testimony that the driver of the army truck had procured the truck for the purpose of drinking beer off the base which he did do. The Court held the testimony immaterial noting that "proper authorization for a trip whose *claimed* purpose was permitted by *regulations* was all that needed to be established." (p. 684) (Emphasis added). In other words, the driver had procured a "proper" trip ticket for what must have been an improper and non-governmental purpose. Thus we have the rather ridiculous comparison of the case at bar, where the tort-feasor was acting honestly, in accordance with long established practice and custom in securing an "invalid" trip ticket, and the *McConville* case, where the tort-feasor used fraud in secur-

ing a "valid" trip ticket. In the former case the Court of Appeals has found no liability. In the latter case the Court holds that this fraudulent intent is immaterial!

These anomalous results prove that Congress did not intend that federal law and decisions should govern the determination of the issue of "scope" of employment. For it is a well-known rule of statutory construction that a statute must be construed reasonably so as to aid the design and intent of the legislature. This Court has gone even further; in the *Yellow Cab* case, supra, this Court held that this very statute must be liberally construed. So Congress, in waiving immunity, should not be said in one breath to have waived liability and then in the other to have authorized administrative agencies through federal regulations to clothe the government with immunity. If federal regulations form the bounds of the employee's scope of employment, the result is that no matter what might be his course of employment *in fact,* the government may be held free of liability because the administrative agency has rules and regulations bounding the scope of his employment *by fiction,* regardless of the governmental purpose being served or of the right of control. And if this is so for the soldier's acts, why not for the civilian's acts? Congress cannot have so intended. It provided that the law where the tort is committed shall apply. And, more important, it said *nothing* of applying a *different* law for members of the armed forces.

II. UNDER NORMAL RULES AND TESTS OF RESPONDEAT SUPERIOR THE RECORD ON THE ISSUE OF SCOPE OF EMPLOYMENT IS UNCONTRADICTED AND DOCUMENTARY. THIS COURT SHOULD DECIDE THESE QUESTIONS IN PETITIONER'S FAVOR AND LEAVE THE DETERMINATION OF THE ISSUE OF DAMAGES TO THE TRIAL COURT.

A. Since the Specific Act of Driving the Army Vehicle for Recreation Was Itself an Authorized Act, the Soldier's Negligence in Performing That Act Gives Rise to Governmental Liability.

Petitioner asks this Court to view the bare facts of the record in the light of the actualities of military service overseas upon Guam at the time of the accident. The Island of Guam is 32 miles long and 4 to 10 miles wide. It is located at least 6,000 miles from the homes of most military personnel stationed there. The military considered the soldier there to be on duty 24 hours a day. Evidently, morale was considered such an important problem that soldiers were individually permitted, by going through customary channels, to use military vehicles for recreational purposes.

These facts illustrate what this case is not. This is not the case where a soldier is on "Stateside" pass seeking "Stateside" pleasures. This is not anything like the case where a soldier on leave in the United States uses his own automobile to go to and from his home, as in *U.S. v. Eleazer,* 177 F. 2d 914. This is not the case where a flier makes unauthorized use of an airplane in the United States and causes personal injuries to plaintiff, as in *King v. U. S.*, 178 F. 2d 320 (CA 5).

This *is* a case like *Murphey v. U. S.*, 179 F. 2d 743 (9th Cir. 1950), and cases and analogies therein cited.

1. In the Factual Context of This Case the Soldier in Using the Vehicle for His Own Recreation Was in Part Serving Governmental Purpose. The Well-Reasoned Case of Murphey v. U. S., is Direct Authority to That Effect. Thus, the Evidence Herein Meets the Ultimate Test of Scope of Employment.

California law (which respondent concedes to be applicable here [Brief in Opposition to Petition for Writ, p. 7, Fn. 6]) states the applicable rule as follows:

> "It is the established rule in this jurisdiction that where the servant is combining his own business with that of his master, or attending to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured; but *the master will be held responsible, unless it clearly appears that the servant could not have been directly or indirectly serving his master.*"
>
> *Ryan v. Farrell,* 208 Cal. 200. (Emphasis added).

Concededly the soldier-driver in the instant case was pursuing authorized recreation in driving the army vehicle. But in accordance with the above rule, this does not end the inquiry. The facts of this particular case present more than the traditional "frolic" situation. This is borne out by the *Murphey* case, *supra.*

In *Murphey v. U.S.* the Ninth Circuit held that under proper facts a soldier's recreational pursuits in a government provided vehicle may be held to

have been within the scope of employment. The facts there presented were as follows. A soldier-driver was stationed with about twenty other men at an *isolated encampment* in Northern California. In order to keep up the *morale* of the men the commander provided an army truck for nightly visits to Klamath for "entertainment, movies, etc." On the night in question, the soldier-driver took the men to town and parked the truck at a designated location. The commanding officer testified that the soldier-driver was not free to use the truck again until such time as the group was ready to return to the encampment. Nevertheless, the soldier-driver and a buddy visited a saloon, returned and got the truck, started toward a nearby Indian ceremonial, and picked up two women along the way. During the trip the truck hit a pedestrian and killed her. The United States District Court found that the soldier was not acting within the scope of his employment because the vehicle was not to have been moved and was not to have been used for personal pleasure. But the Court of Appeals for the Ninth Circuit reversed, holding:

> "The government brief concedes that Brander was acting within the scope of his employment in driving himself and other soldiers into the town of Klamath for their recreation, but contends that such recreational employment of the truck by the sergeant alone could not be a military employment. We do not agree. Improvement of morale of a single soldier is as much military in character as of several . . ." (p. 745).

* * * * * * *

"We think the overriding *purpose* in Brander's employment in the use of the truck in the town of Klamath is the *improvement of the morale* of soldiers in seeking 'entertainment.' The 'movies, etc.' certainly would include the Indian Ceremonial. The government being liable as a private person in California, it is liable where the truck was in use for the broad purpose for which it was employed by Brander, even though he had instructions that he was not 'free' to use it in a particular manner accomplishing that purpose . . ."

* * * * * * *

"Here Brander was seeking the specified entertainment which would improve his military morale. That he was 'directly or indirectly serving his master' in so doing is none the less within the scope of that employment, because he was serving his own desire and that of the other sergeant seeking recreation in taking the latter's two lady friends to the Ceremonial."

The *Murphey* case, and the cases and analogies cited therein, realistically apply the rule of *respondeat superior* to problems of the military. It may be stated as follows. When the type of employment is such that the employee is almost constantly under the employer's wing; when the employee is peculiarly isolated from the usual recreational pursuits; when the employer has unusual control over the hours, area, or instrumentality in which off-time is spent; and when, because of the monotony of the employment, the employer is of necessity directly concerned with the morale and recreation

factor, the "scope of employment" is broadened to include recreational activities. And this is so as much for an individual employee as it is for several.

This is no novel proposition. As the Court in the *Murphey* case said:

> "In an analogous case of seamen held to the monotony of the ship, as these soldiers were to that of their mountain camp, this court in the same division of judges has held that, in seeking allowed recreation, the seaman was in the course of his employment when at a shallow swimming pool he was injured in a dive."
>
> *Ellis v. American Hawaiian SS. Co.* (9 Cir.), 165 F. 2d 999, 1001.

> "In that case we relied upon *Aguilar v. Standard Oil Co.,* 318 U.S. 724, 63 S.Ct. 930, 87 L.Ed. 1107, in which this court stated:
>
> "The assumption is hardly sound that the normal uses and purposes of shore leave are 'exclusively personal' and have no relation to the vessel's business. Men cannot live for long cooped up aboard ship without substantial impairment of their efficiency, if not also serious danger to discipline. Relaxation beyond the confines of the ship is necessary if the work is to go on, more so that it may move smoothly. No master would take a crew to sea if he could not grant shore leave, and no crew could be taken if it could never obtain it. Even more for the seaman than for the landman, therefore, 'the superfluous is the necessary . . . to make life livable' and to get work done. In short, shore leave is an elemental necessity in the sailing of ships, a part of the

business as old as the art, not merely a personal diversion."

Even under state law, where the factual situation here presented can rarely arise, it has been said:

"Similarly it is held that employees are in the course of their employment while properly spending their time, when off duty, in a bunkhouse furnished by the employer and in which they are compelled to live."

27 *Cal. Jur.*, 393, Workmen's Compensation, Section 90.

See also:

Larson v. Industrial Accident Commission, 193 Cal. 406;

State Compensation Insurance Fund v. I.A.C., 194 Cal. 28;

Employer's Liability Assurance Corp. v. I.A.C., 37 C.A. 2d 567;

Union Oil Co. v. I.A.C., 211 Cal. 398;

Truck Insurance Exchange v. I.A.C., 27 C. 2d 813;

Pacific Indemnity Co. v. I.A.C., 26 C. 2d 509;

West v. I.A.C., 79 C.A. 2d 711;

Jiminez v. Liberty Farms Co., 78 C.A. 2d 458;

Pacific Employer's Ins. Co. v. I.A.C., 77 C.A. 424.

Any doubt that providing vehicles for the recreation and the improvement of morale of an individual soldier is a governmental, military purpose, is conclusively answered by the interpretations of the Judge Advocate General *on the very*

issue of scope of employment in administering claims against the United States. These interpretations of the law by the administrative officials of the military are entitled to great weight. *Hironimus v. Durant,* 168 F. 2d 258 (4th Cir. 1948).

In SPJGD/D-205711, March 1946, the Judge Advocate General said:

> "The use and operation of passenger and cargo motor vehicles are among the most common activities of our time. Claims arising from the use of such vehicles by the War Department and the Army constitute the largest single category (about 48%) of claims processed administratively by the War Department. Such claims normally fall within the provisions of paragraph 4c and negligence or otherwise tortious acts on the part of military personnel or civilian employees of the War Department acting within the scope of their employment form the basis of liability on the part of the Government and are prerequisites to approval and payment . . ."

In so administering the Act the Judge Advocate General has allowed the claim where an army driver caused damage while coming back from the post exchange during his rest period (SPJGD/D-99994, 18 August 1945). And in SPJGD/D-100463, 25 August 1945, a claim for personal injuries was allowed because of the negligent driving of an army truck driver who was drunk and yet was authorized to transport girls home from an army dance. In deciding such cases, the military followed Army Regulations 25-70, which adopted normal rules of *respondeat superior.* This regulation provided in part:

"These activities of military personnel . . . ordinarily are within the scope of employment . . . if the purpose is, at least in part, to serve the government . . . In determining whether conduct, although not expressly authorized, is nevertheless within the scope of employment, consideration may be given to all the attendant facts and circumstances, including the time, place, and purpose of the activity; whether the activity was for the furtherance of the general interests of the government; whether the activity is usual for personnel of the grade and classification involved or reasonably to be expected of such personnel; and whether the instrumentality from which the damage or injury resulted was owned or furnished by the government."

2. The Soldier-Driver Here at All Times Was Under the Control and Subject to the Right of Control of the Military, Even While on Pass. The Evidence Thus Meets the Ultimate Test of Liability Under Respondeat Superior.

The California Court has said:

"The essential characteristic of employment relationship is the right to control and direct the activities of the person rendering service, or the manner and method in which the work is performed . . . Existence of the right is often tested by determining whether, if instructions were given, they would have to be obeyed."

Villanazul v. City of Los Angeles, 37 Cal. 2d 718, 721.

This rule is in accord with general agency law. Thus the *Restatement of Agency,* Sec. 228, Comment a, states that the "scope of employment" is the field

of action within which one *is* a servant, and in Sec. 220 defines servant as "one employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is *subject to the other's control or right of control.*"

Petitioner contends that of all types of servants, the soldier-driver here, surrounded as he was by rules, order, regulations, military police, more than meets this test, even while on pass.

The Ninth Circuit in the instant case held that the soldier-driver was on authorized recreational pass away from his post, seeking recreation, and concluded that therefore he could not have been acting within the scope of his authority. But, this is patently incorrect. The *Murphey* case involved a soldier on pass away from his post. Army decisions, some cited above, involve soldiers on pass away from their post. In fact, if the premise is accepted that pursuit of recreation may be activity within the scope of employment, then the fact that such pursuit is further authorized by the granting of a pass merely *bolsters* rather than detracts from a conclusion of liability. Especially on an isolated Army station.

The statements in the Ninth Circuit opinion to the effect that a soldier on pass is at liberty to go where he will and do what he pleases, that leave is a favor extended for his sole accommodation, that a soldier "off duty" is subject to the control of no one but himself (R. 181-182) cannot go unanswered. These, as anyone familiar with military life knows,

are fictions. The soldier on pass, especially at a small overseas post as here, is never beyond the reach of military control. For example, the trip ticket issued to the soldier-driver here required him to return by a certain hour, as did his pass. The accident occurred within the authorized time. Army control governed practically his every action. There are ever-present military police to enforce these regulations.

Even in the United States, his off-time activities would be controlled by the military. There are places off-limits and out-of-bounds where he could not have gone. *Harper v. Jones,* 195 F. 2d 705. Were he a minor in Bainbridge, Maryland, he could not drink alcoholic beverages. Op JAGN 1954/205, 2 March 1954. Were he a professional athlete, he could not have engaged in professional athletics. JAGA 1953/718. And were he but a stockholder in a corporation, he could not even have accepted appointment to a board of directors! JAGA 1952/2573, 19 March 1952.

Certainly it must be said that the soldier-driver at all times was subject to control and the right to control. Were he given orders he would have had to obey them. And the proof of the pudding is that this very soldier-driver was restricted to his post the day following the accident (R. 15).

3. The Fact That the Soldier-Driver Negligently or Wrongfully Performed the Authorized Act of Driving for Recreation Does Not Relieve the Government of Liability.

Admittedly the soldier-driver in the instant case was driving the weapon's carrier negligently. Ad-

mittedly he was driving the vehicle while drunk. But neither of these facts takes his act outside the scope of employment. The doing of an authorized act in a wrongful or prohibited manner will not preclude responsibility of the employer. *Restatement of Agency,* Sections 230, 229; *Fields v. Sanders,* 29 Cal. 2d 834, 839; *Haworth v. Elliott,* 67 C.A. 2d 77, 81; *Hiroshima v. Pacific Gas and Elect. Co.,* 18 C.A. 2d 24. This is elementary law. There would be no cause for vicarious liability unless a wrong had been committed. No sane employer would authorize his servants to commit wrongs, yet they are committed and once committed the employer may be held liable.

> "The test is not whether the wrongful act itself was authorized but whether it was committed *in the course of a series of acts of the agent which were authorized by the principal* and while the agent was still occupying himself with the principal's business within the scope of his employment." (Emphasis added.)
>
> *Deevy v. Tassi,* 21 Cal. 2d 109, 125.

Thus, the master may be liable for the negligent or drunken driving of his servant.

> "It is true that a master would not be exonerated on the theory that his servant was not employed to get drunk and therefore departed from the scope of his employment in doing so. To the contrary, drunkenness on the part of the agent is an act of negligence for which his employer becomes liable, if the servant otherwise is acting within the scope of his employment."
>
> *Christian v. U. S.,* 184 F. 2d 523, 525 (6th Cir. 1950).

B. Even If the Soldier-Driver's Authority to Drive Was Limited to Transportation to and From Government-Provided Recreation Facilities, His Acts Were Within His Scope of Employment.

The lower courts here in their zeal to relieve the government of liability have confused two distinct aspects of the soldier-driver's authority. The evidence is that *the mere driving for recreation was authorized* (R. 134, 127). Talk in the lower courts' opinions on "frolic" is completely inappropriate where the so-called "frolic" is the negligence in performing the very act authorized, namely, merely driving the vehicle. But there is another aspect of authority,—the authorized use of the vehicle in going to and from government-provided recreational facilities—the NCO Club. Talk of "frolic" may be more appropriate if the soldier-driver's authority was thus limited. But even then, under the rule of *Murphey v. U. S.*, 199 Fed. 2d 743, *supra,* his acts were within the scope of employment. No material distinction exists between that case and the instant case.

The dissenting judge in the *Murphey* case wrote for the Court in the case at bar. He felt that the *Murphey* case involved the question of whether the negligent act was committed while engaged in such a deviation from employment, *i.e.,* frolic, as to relieve the government of liability. Petitioner contends that, so considered, the *Murphey* case is even stronger authority for her position here, since the Court's distinctions are immaterial. The Court below sought one distinction in the fact that unlike Corporal Seabourn, the army driver in the *Murphey* case was acting under

"specific authorization of his commanding officer" to take the truck into town "for pleasure under instructions" for "entertainment, movies, etc.", another that the majority of the Court thought that the "official permission" thus granted was broad enough to include a visit to an Indian dance being held a short distance outside of this town and that this was "digression", another that "it was not contended that he was drunk at the time, or that drinking contributed in any way to his negligence", another that the soldier-driver there was seeking "specified entertainment", another that the soldier-driver's superior officer knew that as incidental acts the truck was employed to reach places of entertainment outside of Klamath. In the case at bar there is evidence that the use of army vehicles for "recreation" to go to the NCO Club and elsewhere and back to post had been a long established practice indulged in by all members of the soldier-driver's post, officers included. It is a certainty that his superior officers, specifically Lt. Werb, knew of this long established custom. Moreover, the *Murphey* case truck driver had visited a saloon. For what purpose other than drinking? Indeed he had picked up two lady friends as passengers! The District Court in the *Murphey* case found that special permission was required to use the vehicle for the pleasure of the men to go to any place other than Klamath, and the truck driver was not authorized to operate the vehicle for his use or for any other use than that of driving to Klamath and parking the vehicle by the side of a building. Here,

likewise, it is claimed that regulations governing the use of the vehicle were violated. Finally, where the court below emphasized that the government in the *Murphey* case was held liable because the truck was used for the "overriding specific purpose" of improving the morale of soldiers in seeking "entertainment, movies, etc.", even though the truck driver had instructions that he was not free to use it in a particular manner accomplishing that purpose, the similarity between the *Murphey* case and the instant case is startlingly apparent. In the case at bar the soldier-driver was authorized to use the vehicle for "recreation". Petitioner can find no distinction between "entertainment" and "recreation", or "movies, etc." and "recreation". The soldier-driver here was seeking, specifically, "recreation". If the *Murphey* case truck driver was not on such a frolic as would preclude liability, then neither was Corporal Seabourn.

C. The Uncontradicted Evidence of Custom and Practice Conclusively Establishes the Authority of the Soldier-Driver in the Two Respects Here Relied on: (1) Authority to Drive the Vehicle Itself for Recreation; (2) Authority to Drive the Vehicle To and From Government-Provided Recreational Facilities. This Custom and Practice Also Proves That Any Violation of Army Regulations Did Not Affect That Authority.

The uncontradicted evidence herein is that the soldier-driver followed the usual channels and procedure by obtaining an official pass for recreation, obtaining the usual trip ticket, obtaining the vehicle from the motor pool, and checking out the vehicle at the dispatcher's office when he left the base. All the

men in his outfit followed a long established custom of passing around trip tickets for vehicles and using the vehicles for recreation, officers included. The driver's own superior officer, Lt. Werb, followed this custom (R. 131, 139). This custom, though perhaps in technical violation of certain army regulations, was proof and conclusive proof, of Corporal Seabourn's authority (1) to drive the vehicle for recreation and (2) to drive the vehicle to and from government-provided recreational facilities and elsewhere.

Certainly this evidence was relevant. In determining whether injuries arise out of or in the course of employment under the Workmen's Compensation Act, the California Court has said:

> "In determining whether a particular act is reasonably contemplated by the employment, the nature of the act, the nature of the employment, *the custom and usage* of a particular employment . . . should be considered."
>
> *Employers' Etc. Corp. v. IAC,* 37 C.A. 2d 567, 573.

Actual authority in agency under California statute is "such as a principal intentionally confers upon the agent, or intentionally, or *by want of ordinary care, allows the agent to believe himself to possess.*" *Calif. Civ. Code,* Sec. 2316.

Thus, if the agent or servant over a long period of time adopts a practice, and the principal through indolence or neglect permits the practice, the agent may assume that he has the authority and approval of his

principals so to act. This is actual authority, sufficient to bind the principal in the tort of fraud. *Vertex Inv. Co. v. Schwabacher,* 57 C.A. 2d 406, 418. That was done in the instant case.

Undoubtedly the trial court committed error in failing even to consider the evidence of custom. In the *Murphey* case, supra, the Court in holding for the plaintiff did look to testimony that there had been at prior times permission to use the truck for recreation in places of short distance outside of Klamath, with the knowledge of the driver's superior officer. This is evidence of custom and practice. And the Army itself in several decisions on scope of employment has likewise looked to custom. In SPJGD/D-53973, 29 January 1945, a soldier having no driver's permit was detailed to wash army cars on a wash rack. While attempting to drive one of the vehicles onto the rack he was forced by traffic to circle the block. He negligently hit a pole which fell onto the claimant's vehicle. Held: The driver was carrying out a *daily custom* of moving vehicles for a purpose beneficial to the government and the act, therefore, was within the scope of his employment. In SPJGD/D-99994, 18 August 1945, where the army driver drove to the post exchange during his rest period, the Judge Advocate noted that the post exchange was at the other end of the post and that *it was customary* for drivers to drive there in their trucks during rest periods. The soldier parked the truck at the rear of the post exchange, as he and other drivers were *accustomed* to do with the knowledge

of their immediate superiors. The drivers were not authorized to park there. Held: The rest period did not take the driver outside the scope of employment; nor did his action in parking the truck which was a well known procedure of long standing. Even if the driver's action were regarded as a violation of standing instructions, it was not such disobedience to authority or radical departure from authorized activities as to place him outside the general scope and purpose of his employment.

While it may appear that certain army regulations governing the use of vehicles were violated by the practice authorized on Guam, as held by the Ninth Circuit, and that the acts pursuant thereto were not authorized, yet this custom and practice itself proves that the acts fit within an exception actually contemplated by the regulations! And even if there were a violation, this does not affect the authority actually given. The evidence here is that Lt. Werb himself participated in and thus must have authorized the so-called "loose post practice" (R. 131). In such event the situation is similar, if not precisely the same, as the situation in *Cannon v. U. S.*, 188 F. 2d 444 (9th Cir. 1951). The *Cannon* case was an action for alleged malpractice in an army hospital. The trial court dismissed the action on the ground that the Commanding Officer of the hospital erroneously had admitted the plaintiff, a civilian, had violated Army Regulations, and, therefore, his and his subordinate's acts could not be within the scope of their employment. The appellate court, however, reviewed the ap-

plicable army regulation, found that it had indeed been violated, in that the disease for which the plaintiff was treated was not therein specified for army treatment, but concluded as follows:

> "We are of the opinion that this testimony, coupled with the official record stating the source of appellant's admission, was prima facie evidence (unrebutted in the record) of *an administrative finding of fact,* namely that this civilian was suffering from a type of disease specified in Regulation 6b(13). Keeping in mind the evidence and the presumption of regularity in the performance of official duty, it is inferable that the finding was made by Colonel Smith, the command-officer of the hospital. *The factual determination was one which the regulations authorized the officer to make, hence his action in making it was obviously within the course and scope of his authority.* This we think would be true, though, in view of the court, the officer was in error in his appraisal of the nature of the affliction from which this civilian employee was suffering. A different situation would be presented if the Regulations altogether excluded civilian employees as patients (Emphasis added).

Like the Officer in the *Cannon* case, Corporal Seabourn's superior officer was also vested with authority to make findings with respect to operation of the vehicles under his command. AR 700-105(19) provides:

> "Each commanding officer is responsible for the vehicles under his direction. He is responsible for the proper operation of vehicles and the performance of prescribed organizational maintenance."

AR 700-105(28) poses situations for factual findings respecting the use of such vehicles:

> "28. Special uses. Motor vehicles when available without detriment to *other* official business . . . may be used by special direction of the commanding officer for the following purposes:
>
> * * * * * * *
>
> "b. Transporting personnel, including entertainers and party guests, and supplies and equipment in connection with authorized, organized, and supervised recreational, welfare, and morale-building activities."

As in the *Cannon* case, Lt. Werb, in permitting the custom under his command, if not expressly, then at least impliedly, found that the transportation of soldiers to and from the N.C.O. Club on Guam was in connection with an organized, supervised recreational and morale building activity, namely, the government-provided and supervised Non-commissioned Officers Club. Like the *Cannon* case, this case might have been different if Army Regulations altogether had excluded the use of army vehicles for recreational activities. But they did not.

Furthermore, liability under respondeat superior may rest upon the conduct of the servant "incidental to the conduct authorized." *Rest. Agency,* Sec. 229.

> "An act may be incidental to an authorized act, although considered separately it is an entirely different kind of an act. To be incidental, however, it must be one which is subordinate to or pertinent to an act which the servant is employed to perform. It must be within the ultimate objec-

tive of the principal and *an act which it is not likely that a servant might do . . .*"

Rest. Agency, Sec. 229, Comment b.

As the Court held in the *Murphey* case, *supra,* it is only reasonable to conclude that the recreational use of an army vehicle by a single soldier is one such act "incidental" to the expressly authorized use of vehicles for organized recreational activities. It certainly is an act which it is not unlikely that such a servant might do in going to and from an N.C.O. Club. It was, in fact, done here.

Even the army does not sanctify its orders and regulations to the extent that the Ninth Circuit has done below. In the Post Exchange Army decision, SPJGD/D-9994, 18 August 1945, and in the Driving Without Permit Army decision SPJGD/D-53973, 29 January 1945, supra, liability was administratively fixed by the army upon the government, even though orders had been disobeyed.

But even assuming that army regulations were violated, the government is not thereby freed of liability. Thus, in the *Murphey* case, *supra,* disobedience of standing orders to leave the truck parked in Klamath did not serve to put the driver's acts outside the scope of employment. And indeed to hold that army regulations bound the scope of a soldier's employment would limit government liability to a ridiculous extent. For example, violation of the Army Regulation against drunk-driving would, *ipso facto,* place the negligent act outside the scope of employment. Such a theory

runs directly contrary to applicable substantive master and servant law:

> "An act although forbidden or done in a forbidden manner, may be within the scope of employment." *Rest. Agency,* Sec. 230.

D. Since the Evidence Is Uncontradicted and Documentary, This Court May Make Its Own Determination on the Issue of Scope of Employment.

Ordinarily, of course, the issue of scope of employment is a "question of Fact," and rules of appellate review ordinarily inhibit the appellate court from redetermining such questions. This, however, is not the case here. Just as the Ninth Circuit reversed the unjust decision of the trial court in *Murphey v. U. S.,* 179 Fed. 2d 743 (9th Cir. 1950), so this Court may do here.

As the Court said in *Murphey v. U. S.:*

> "The entire evidence is in two depositions of witnesses taken by the United States and hence warrants our own consideration of its probative value, with due respect to the findings of the court below. *Equitable Life Assurance Soc. v. Irelan,* 9 Cir., 1941, 123 F. 2d 462, 464; *Smith v. Royal Insurance Co.,* 9 Cir., 1942, 125 F. 2d 222, 224, certiorari denied 316 U.S. 695, 62 S.Ct. 1291, 86 L.Ed. 1765; *Stork Restaurant, Inc., v. Sahati,* 9 Cir., 1948, 166 F. 2d 348."

III. THE ACTS IN LINE OF DUTY OF RELEASING TO A DRUNKEN SOLDIER AN ARMY VEHICLE CONSTITUTED IN THEMSELVES SUCH NEGLIGENCE AS TO IMPOSE LIABILITY UPON THE GOVERNMENT.

The California Court has aptly said:

> "The employer's responsibility for the tortious conduct of his employee 'extends far beyond his actual possible control over the conduct of the servant. It rests on the broader ground that every man who prefers to manage his affairs through others, remains bound to so manage them that third persons are not injured by any breach of legal duty on the part of such others' while acting in the scope of their employment . . . Such injuries are one of the risks of the enterprise . . ."
>
> *Carr v. Wm. C. Crowell Co.*, 28 C. 2d 652.

In the words of the Restatement:

> "Since the phrase 'scope of employment', is used for the purposes of determining the liability of the master for the conduct of servants, the ultimate question is whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed."
>
> *Rest. Agency*, Sec. 229, Comment a.

Here petitioner was seriously and permanently injured by reason of the drunk driving of Corporal Seabourn. She suffered lacerations (R. 35), fractured transverse processes of three vertebrae (R. 39), scarring and restricted motion of her right leg (R. 35-36), recurring and persistent headaches, pain in

the chest, back ache and chronic back strain, uncontrollable trembling and shaking of the muscles of her legs' functional involvement, all resulting in a loss of 35% of her ability to do general work (R. 40). These conditions are permanent (R. 39), and involve, and would involve, further surgery and treatment resulting in medical expenses alone of over $2,000.00 (R. 39).

It is not just that she alone be forced to bear this loss. There is more than one avenue of governmental liability. The entire practice of issuing vehicles for recreation, the practice, specifically, of issuing to a soldier who had been drinking all day, the vehicle here involved is one interrelated tortious transaction. If Corporal Seabourn was not acting "in line of duty" at the time of the accident, then surely the dispatcher in issuing him the vehicle was acting "in line of duty", and Lt. Werb in authorizing the use was acting "in line of duty". Petitioner feels that issuing to a soldier already drunk a vehicle for transportation to a club where further drinking may be indulged in; and, even more, letting loose a drunk Army driver in an Army vehicle upon the highways of Guam were such culpable acts as themselves impose liability upon the government. The government, like any corporate body, can only act by and through its agents and servants. With its vast resources and powers of discipline and control up and down the lines of command, the government should bear the responsibility for what is clearly not one, but a series of acts of negligence which it had and has the power to curb and prevent.

CONCLUSION.

For the reasons foregoing petitioner prays that th Court give judgment in her favor and remand to t trial court the determination of damages. Failing th petitioner prays that the entire judgment be revers and remanded for retrial consistent with a corre interpretation of the Tort Claims Act.

In any event petitioner prays for her costs in th proceeding. Because of her impecuniousness pet tioner was forced to proceed before the Court of A peals by way of typewritten brief (R. 56). Relyi as she has upon direct authority in her circuit, *Mu phey v. U. S.*, 179 F. 2d 743, and relying upon th denial of the government's motion for summary jud ment, petitioner has seen only mounting costs of li gation and the belated disavowal by the circuit o the *Murphey* case. Her damages and impecuniousn continue. Her appeal to this Court was made possib only by advancement of some expenses by her cou sel. And since the interpretation of the Act is a ma ter of nationwide concern, important to all the peop of the United States, it is felt the costs of that inte pretation should be paid by their government and re payment made to petitioner's counsel of expens advanced.

Dated, San Francisco, California,
July 11, 1955.

Respectfully submitted,
HENRY C. CLAUSEN,
Attorney for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 24

ALTHEA G. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Northern District of California, Southern Division (R. 44-47) is reported at 105 F. Supp. 208. The opinion of the Court of Appeals for the Ninth Circuit (R. 168-182) is reported at 215 F. 2d 800.

JURISDICTION

The judgment of the Court of Appeals was entered on September 8, 1954 (R. 183). The petition

for a writ of certiorari was filed on December 6, 1954, and was granted on January 31, 1955 (R. 183). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Government is liable under the Tort Claims Act—which is expressly limited to injuries caused by the negligence of a Government employee "while acting within the scope of his office or employment"—for injuries caused by a serviceman who, while off duty and on pass, obtained unauthorized possession of a military vehicle and went joy riding in it.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Federal Tort Claims Act and the Army Regulations are set forth in the Appendix, *infra*, pp. 49-51.

STATEMENT

Petitioner, an employee of a private construction firm in Guam, sustained personal injuries when a parked auto in which she was sitting was struck by a military vehicle driven by Cpl. J. R. Seabourn (R. 51, 168). The accident occurred in Agana, Guam, at about 10:30 p.m. on March 3, 1949 (R. 51, 168).

The record and the findings of the courts below reveal that on that day Seabourn, a supply clerk assigned to a military service unit in Guam, was off duty, having obtained a pass to leave the base for the day (R. 14, 27, 51). He "did not work at

all that day" and left the base at noontime with two other servicemen, Pvt. Schmidt and Cpl. Benson[1] (R. 14, 44, 51). The three men hitchhiked and later hired a cab to go to Agana, spending the entire afternoon "drinking and running around" (R. 8, 14, 16, 22, 25, 51).

They returned to the base at about 7:00 p.m., and while there, Seabourn "picked up" a "so-called 'trip ticket' " for a ¾-ton military vehicle from a Sgt. Stiles in his unit (R. 14, 44, 170). This ticket had been made out about 8 o'clock that morning to a driver named Cabera, another serviceman who worked with Seabourn (R. 32, 28-29). The ticket "discloses that the vehicle had been requested by a Lt. W. R. Werb, and use of the vehicle was therein authorized for 'Official Business' " (R. 171).[2] Listed on the ticket are "the various official points" to which the vehicle was driven that day, *e.g.*, from the "Motor Pool" to "Base Supply," to "Warehouse 1," and to "374 Maintenance" (R. 171). As the Court of Appeals pointed out, "Neither Seabourn's nor Stiles' name appears on the ticket, nor was Seabourn's use of the vehicle in any way indicated thereon" (R. 171-172).

Seabourn testified (by deposition) that he realized that the trip ticket had been "issued for official business" and therefore knew that it did not

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[1] Cpl. Benson was sometimes referred to as Cpl. Vincent during the trial and is so named in the opinion of the court below (R. 170, 173). It was stipulated that both names refer to the same person (R. 136).

[2] The trip ticket is set out in full at R. 32-33 and at R. 171, note 2.

cover use of the vehicle for recreation (R. 25, 28-29, 14). Moreover, he had never "check[ed] out one for recreation" (R. 29). Nevertheless, by using the trip ticket—as both courts below have held—"Seabourn obtained unauthorized possession" of the vehicle (R. 51, 172). It is true that Seabourn (R. 14, 26, 28) and Schmidt (R. 9, 12) did state that in the "service stock" section, to which they both belonged (Vincent did not belong to that unit), it was customary for trip tickets to be passed around regardless of the name of the person to whom the ticket was issued, and that, regardless of the regulations, the vehicles were used at night. Schmidt, in answer to a written interrogatory, also stated that if "there was a trip ticket the vehicle could have been used for official business or for recreation" (R. 9). But Seabourn himself, in answer to the same interrogatory, stated, "No, sir [*i.e.*, a trip ticket for a vehicle for official business could *not* be used for recreation]. I don't guess it was. I don't know whether they issued trip tickets like that or not. *I never did check out one for recreation*" (R. 28-29) (emphasis added). Similarly, Vincent's testimony was that he had "never used [Army vehicles] for recreation" (R. 21).

The trip ticket itself showed that the vehicle had been issued and used solely for "official business" on the post for the entire period before Seabourn took possession of it, *supra*, p. 3 (R. 32). Both federal statute (5 U.S.C.78(c)(2)) and Army Regulations (A.R. 700-105, par. 26*c*, *infra*, pp. 50-51) provide that motor vehicles may be used

for official business and, with the "special direction of the commanding officer," for transporting personnel in connection with "authorized, organized, and supervised recreational" activities (A.R. 700-105, par. 28*b*, *infra*, p. 51). There was no showing, and hardly a claim, of compliance with this regulation.

The courts below made no definitive or express findings on the issue of the actual custom or practice at the time (see R. 45, 51, 180). The trial court, in fact, rejected petitioner's proposed finding that Seabourn's use of the vehicle was "in accordance with the established custom and practice of the military of Guam" (R. 49). And in the court below, petitioner urged without success that the trial court had erred in failing to accept that finding (R. 55). Both courts, as already noted, found Seabourn's use of the car unauthorized.

After getting possession of the vehicle, Seabourn, Schmidt, and Benson had some more drinks and decided to go for another ride to Agana (R. 14, 16, 25, 44, 51). Some time prior to the accident, Seabourn let his companions out of the vehicle in Agana and drove off alone (R. 14, 25). There was "overwhelming evidence that Seabourn was drunk at the time" of the accident (R. 14, 19, 25, 136, 168). Seabourn remembered nothing further until the next morning, when he awoke beside a road (R. 15, 26, 45, 51).

Petitioner's complaint against the United States under the Tort Claims Act, filed on May 23, 1949, in the United States District Court for the Northern District of California, asserted that Seabourn

operated the Government-owned vehicle negligently while acting in the line of duty (R. 1). These allegations were denied in the Government's answer (R. 6). Upon trial of the case, the District Court found that the accident was caused by Seabourn's negligence (R. 51). It further found, however, that Seabourn was off duty and away from his base on a pass when the accident happened; that he had obtained unauthorized possession of the military vehicle; that he was not using it for any purpose authorized by Army Regulations, by his superior officers, or by the trip ticket; that, instead, he was on a frolic of his own, and not acting within the scope of his employment (R. 47, 51-52). Judgment was therefore entered in favor of the Government (R. 52-53).

On appeal, the Ninth Circuit reviewed the facts independently and made equivalent findings, after noting that the facts "outlined above are fully reflected in the record before us" (R. 172). The Court of Appeals found that "Seabourn's use of the vehicle while * * * 'off duty' and in quest of entertainment, was not a use in furtherance of any prescribed or indicated military duty"; that Seabourn did not use the vehicle to "serve any prescribed or noted military purpose or interest of the government"; that his use of the vehicle was not "motivated by such a purpose"; that his superior officers "had no knowledge of, or supervision over, the use of the vehicle while it was in Seabourn's possession, nor any control over Seabourn after he had secured it from Stiles"; and that no order had

been issued by any superior officer "directing or authorizing Seabourn to use the vehicle for *any purpose,* military or otherwise (including 'recreation')" (R. 172). Pointing out that a private employer would not "be held liable in damages for the tortious act of an employee occurring on an allowed 'day off' while he is out driving on a joy ride while drunk," the Court of Appeals affirmed the District Court judgment, which exonerated the Government from liability for Seabourn's negligence while "out on a wild frolic" (R. 179, 180, 183).

SUMMARY OF ARGUMENT

I

A. The only permissible basis for imposing liability on the United States in this Federal Tort Claim Act suit would be a determination that the driver of the military vehicle was acting within the scope of his employment when the accident happened. The courts have pointed out that the "heart and substance" of the Act is its requirement, in 28 U.S.C. 1346 (b), that the claim arise out of the negligence of a Government employee while acting within the scope of his employment. In incorporating the "scope of employment" requirement into the Act, Congress plainly intended to have the Government's vicarious liability for the torts of its employees measured by the conventional *respondeat superior* test, as it has developed in ordinary "common law" actions by injured third parties against

private employers. The expanded concept of "course of employment" which is used in the workmen's compensation field and in special legislation for the benefit of employees is not applicable.

B. This "common law" test applies under the Act whether the tort be that of a civilian employee, or, as in the present case, the tort of a member of the armed services.

The fact that 28 U.S.C. 2671 defines acting within "the scope of * * * employment" to mean "acting in line of duty" in case of military personnel does not mean that the area of federal liability for military torts is either broader or narrower than it is for torts of civilian employees. The history and policy of the Act and all decided cases dealing the problem confirm the need for rejecting the "broadened liability" contention and for holding that the identical *respondeat superior* test applies to torts of servicemen and civilian employees.

Although the opinion below does contain ambiguous language which may be read as restricting the area of federal liability for soldiers' torts, it is quite clear that the Court of Appeals also applied the conventional test in determining that Seabourn, the serviceman, was acting outside the scope of his employment. And it may well be that the insistence in the opinion that "line of duty" means line of military duty was not intended to discard the normal *respondeat superior* test for military personnel, but was included to make certain that liability for military torts would be based not on the broad "line of duty" concept employed in veterans' bene-

fit legislation but on the doctrine of *respondeat superior,* so that the Government would be liable only when the soldier, at the time of the accident, was furthering his military or business duties.

II

A. Two considerations are controlling in determining whether an employee has acted within the scope of his employment and has thereby exposed his employer to liability. First, the employee, at the time of the accident, must be engaged in furthering his employer's business. In the words of Judge Cardozo, the first or "dominant purpose must be proved to be the performance of the master's business." *Fiocco* v. *Carver,* 234 N.Y. 219, 223. The second essential requirement of the employer's vicarious tort liability under *respondeat superior* is that the employer must have the right of control over the employee at the time of the accident.

Neither of these two requirements was met here. Seabourn's unauthorized taking of the Government vehicle was not even remotely connected with his official duties. It was, in fact, contrary to the pertinent Army regulations. As emphasized by both courts below, Seabourn used the truck on a wild frolic and joy ride, rather than on military business of any kind. Moreover, since he was on pass and off duty, he was on his own and his specific conduct in driving was subject to the control of no one but himself.

B. Army vehicles are available under the regulations for use in authorized, organized, and super-

vised recreational activities. When so used, the soldier assigned to drive the vehicle acts within the scope of his employment because he has been authorized to drive it on Army-controlled and Army-supervised recreation. Seabourn, obviously, did not use the vehicle for any such purpose. His use of the vehicle, while joy riding and drunk, was, as the court below noted, "a far cry" from any authorized recreational activity. Petitioner insists that there existed a "custom" or "practice" in Seabourn's unit to use military vehicles for individual recreation at night, but even if that were true such a casual and surreptitious "custom" could not avail to counteract the Army regulation which plainly and explicity made his use of the car unauthorized and indicated that driving military vehicles for individual "recreation" of this type was not of benefit to the service.

C. The opinion below properly looks, we submit, to federal law in determining whether a serviceman's conduct is within the scope of his employment under the Act. Any other view would subject the Government-employee relationship to the force of dissimilar and frequently irreconcilable state laws.

In any event, the choice of law question presents no problem in this case. Whether resort be had to federal or state authorities, it is clear that there can be no *respondeat superior* liability where, as here, the employee obtains unauthorized possession of his employer's vehicle and has an accident while out on a wild frolic.

D. As pointed out above, the workmen's compensation test of "arising out of and in the course of employment" and the "service of the ship" concept drawn from maritime law—just like the broad "line of duty" standard for veterans' benefit purposes—can have no application in ascertaining the existence of a *respondeat superior* liability. But even if those three broad tests are invoked, there could not, in view of the facts here involved, be any liability on the part of the United States for Seabourn's tort.

III

Petitioner also argues that apart from the question of federal liability for Seabourn's tort there is "another avenue of governmental liability." The alternate ground urged by petitioner seems to be that liability should be predicated on Government ownership of the vehicle and on asserted negligence in entrusting it to Seabourn.

A. Several states do impose liability on the owner of a vehicle for its negligent operation irrespective of whether the operator was acting within the scope of his employment for the owner or was even in the owner's employ. But it seems settled that such a liability may not be imposed under the Tort Claims Act in view of the Act's express requirement that the tort of the Government employee be committed while acting within the scope of his employment.

B. The short answer to petitioner's argument that there was negligence in entrusting the vehicle to Seabourn is the fact that no such negligence was

drawn into issue by the complaint. The complaint asserted negligence only on the part of Seabourn in driving the vehicle. It did not assert negligence on the part of any other military or Government personnel. Thus, the United States has had no opportunity to present its evidence on the issue raised for the first time by petitioner in this Court. Furthermore, petitioner's evidence in the case fails to support the charge of negligence of any military personnel other than Seabourn.

ARGUMENT

I

Federal Liability Under the Tort Claims Act Extends Only to Torts of Federal Employees Acting Within the Scope of Their Employment.

A. *The Plain Terms of the Act*

The basic precondition of federal liability under the Tort Claims Act is set forth in 28 U. S. C. 1346(b), *infra*, p. 49. That section, in conferring jurisdiction on the district courts over tort claims against the United States, provides that the claim, to be cognizable under the Act, must arise out of the negligence of a Government employee while "acting within the scope of his office or employment." This "scope of employment" requirement is, as emphasized by the courts, "the very heart and substance of the act." *United States* v. *Campbell*, 172 F. 2d 500, 503 (C. A. 5), certiorari denied, 337 U. S. 957; *United States* v. *Eleazer*, 177 F. 2d 914 (C. A. 4), certiorari denied, 339 U. S. 903.

Since the common "law has always been that a master is not liable for the acts of his servant or agent unless acting within the scope of his employment," [3] it was natural for Congress, in defining the extent of governmental liability for tortious conduct of federal employees, to transplant this firmly established principle of *respondeat superior* into the Tort Claims Act. Thus, the bare terms of the Act

> make[s] it crystal clear that in enacting it and thus subjecting the Government to suit in tort, the Congress was undertaking with the greatest precision to measure and limit the liability of the Government, under the doctrine of *respondeat superior* * * *. [*United States v. Campbell,* 172 F. 2d 500 (C. A. 5), certiorari denied, 337 U. S. 957]

Accordingly, in determining whether the United States is liable to a third party for the wrongful conduct of its employee, one must look to the traditional, common law development of the concept of "scope of employment" in the general law of torts, and not to the special meanings which that word may have acquired in the law of workmen's compensation or other legislation adopted to benefit

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[3] *Psota* v. *Long Island R.R. Co.*, 246 N.Y. 388. For the historical development of *respondeat superior*, see Holmes, *Agency*, 4 Harv. L. Rev. 345, 354 (1891); Wigmore, *Responsibility for Tortious Acts: Its History*, 7 Harv. L. Rev. 315, 330 (1894); Smith, *Frolic and Detour*, 23 Col. L. Rev. 444. The rationale of the law of *respondeat superior* has been traced by Justice Douglas in *Vicarious Liability and the Administration of Risk*, 38 Yale L. J. 584 (1929).

employees. Cf. *Cardillo* v. *Liberty Mutual Co.*, 330 U. S. 469, 481; *Cudahy Packing Co.* v. *Parramore*, 263 U. S. 418, 423-4. Since Congress has made the United States liable, in general, as if it were a private employer, the same general principles of "scope of employment" govern under the Tort Claims Act as if an ordinary "common law" action had been brought by an injured third party against a private employer.

B. *The Same Standard of Federal Liability, Based on the Respondeat Superior Principle, Applies to Torts of Military and Civilian Personnel of the Government.*

Petitioner's primary position appears to be that the same *respondeat superior* principle applies "to the tort of a soldier as to the tort of a civilian employee" (Petitioner's Opening Brief, p. 20). However, she also contends, alternatively (Pet. Br. 21-22), that Congress desired to "broaden the liability [of the United States] for acts of members of the armed forces." We agree fully with petitioner's primary position and reject her secondary contention.

1. The argument advanced in support of the "broadened liability" theory is that 28 U. S. C. 2671 of the Act (*infra*, p. 50) defines acting within "the scope of employment" to mean "acting in line of duty" in case of military personnel; that the phrase "line of duty" has been construed in other statutes in a very liberal fashion so as to include conduct outside, as well as within, the

"scope of employment" test based on the conventional *respondeat superior* principle; and that this liberal construction must be mechanically applied to the Tort Act so as to make the United States liable for practically every tort committed by a soldier or sailor. Thus, since a soldier is considered to be in "line of duty" for pension and other disability benefit purposes if he is injured while on pass or while hitchhiking, petitioner's brief urges that the United States, under the Act, should also be held liable for injuries caused to third persons by such a soldier (pp. 21-22).

But this argument, aside from ignoring the significance of adding the word "acting,"[4] overlooks the need for attributing different meanings to a phrase like "line of duty," when it is used in statutes having totally distinguishable backgrounds and purposes. Moreover, the history and policy of the Tort Claims Act and the cases decided under it confirm the view that such a broadening of liability of the United States for torts of its military personnel, unrelated to their duties, was never intended by Congress.

a. It is, of course, not unusual for the same words to be used with different meanings in different acts, and, in fact, even in the same act. *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 433. This

[4] The statutes and decisions dealing with "in line of duty" for compensation or dependency benefit purposes treat it as a status, not requiring any affirmative action on the serviceman's part or close association with the principal's business. The phrase "*acting* in line of duty" (the equivalent of "*acting* within the scope of employment") seems to imply a more positive connection with official work or services.

is especially true in legislation affecting servicemen. For example, this Court has held that a Navy paymaster's clerk is not an "officer" within the meaning of that word as used in one statute (*United States* v. *Mouat*, 124 U. S. 303), but, in a decision handed down the same day, held that such a clerk was an "officer" for the purpose of a different statute (*United States* v. *Hendee*, 124 U. S. 309). See *Mitchell* v. *Cohen*, 333 U.S. 411, 418; *Brooks* v. *United States*, 337 U. S. 49, 52. Such results, far from being inconsistent, simply effectuate the different legislative purpose underlying each of the statutes. Cf. *Boston Sand Co.* v. *United States*, 278 U. S. 41, 48; *United States* v. *Dickerson*, 310 U. S. 554, 561. Certainly, the phrase "line of duty" is not capable of so standard and precise a definition [5] as would permit its application without "examination of the statutory scheme" and "without help from the context in which it appears and the purpose for which it was inserted in the statute." *Mitchell* v. *Cohen*, 333 U. S. 411, 417-418.

Here, petitioner's attempt to invoke the broad meaning given to the phrase "line of duty" in legislation granting benefits to servicemen or their dependents for injury or death incurred during military service disregards the basic reason for

[5] Apart from veterans' benefit legislation, where there is a broad social need for expanding the "line of duty" concept so as to award benefits to servicemen and their dependents, the phrase "line of duty" has frequently been restricted to acts performed in the discharge of required employment duties and has been limited to performance of the work of employment. *Allen* v. *The B., C.R. & N.R. Co.*, 57 Iowa 623, 627; *Mesker* v. *Bishop*, 56 Ind. App. 455, 464.

that broad scope. Congress has expanded the "line of duty" concept in such legislation to reward servicemen for the sacrifices caused by their separation from civilian life and for the understandable and desirable purpose of making benefit payments to such servicemen and their dependents in all situations except where the injury or death (1) was the proximate result of the serviceman's own misconduct or (2) occurred while he was deserting the service or under confinement by sentence of a military or civil court. See Act of September 27, 1944, 58 Stat. 752 (par. 8, E. O. 6098, March 31, 1933, Vet. Reg. No. 10, ch. 12A, 38 U. S. C.); cf. 32 Op. A. G. 12 (1919).

It is for that reason that even injuries sustained by a soldier in the course of his remunerative employment for a private concern, while he is on furlough from his military duties, are deemed to have been incurred in "line of his duty" for the purpose of awarding pension benefits. Veterans Administration Decision No. 715, June 28, 1946, on "Payment of pension for disability incurred while on pass (authorized leave) and in private employment," *Decisions of the Administrator of Veterans' Affairs,* vol. 1, p. 1470. It would follow, if petitioner's "broadened liability" contention is correct, that the United States would be liable under the Tort Claims Act to a third person injured by that soldier's negligence in the course of his private employ. So absurd a result makes it apparent that while a liberal interpretation of "line of duty" is justifiable to prevent a deprivation of veterans'

pension benefits, there obviously is no basis for thrusting such an interpretation into totally different legislation such as the Federal Tort Claims Act. There, the relationship of the serviceman to the United States is important only for the purpose of answering the question whether the serviceman, at the time of the tort, was sufficiently about the business of the United States so as to make the government liable for his torts.[6]

b. Nothing in the legislative history of the Federal Tort Claims Act warrants a carry-over of the broadened "in line of duty" concept. To the contrary, that history makes it reasonably clear that Congress never intended that the phrase "line of duty," in the definition section of the Act, 28 U. S. C. 2671, would lead to imposing liability on the United States for torts committed by military personnel outside the scope of their employment. The fact is that Congress added the phrase "line of duty" to the "scope of employment" definition in 28 U.S.C. 2671 because soldiers and sailors are generally not considered to be employees of the United States and hence the phrase "scope of employment" would have uncertain and awkward application to their conduct. As noted by Chief Judge Parker, the "line of duty" language was "doubtless used because it was felt that as to military and naval personnel 'line of duty' more correctly described action representing the govern-

[6] In *United States* v. *Campbell*, 172 F. 2d 500, 502 (C.A. 5), certiorari denied, 337 U.S. 957, Chief Judge Hutcheson saltily points out that failure to reject the "broadened liability" argument would subject the United States to liability "for practically everything a sailor or soldier does."

ment than 'scope of employment'." *United States* v. *Eleazer,* 177 F. 2d 914, 918 (C. A. 4), certiorari denied, 339 U. S. 903. This was expressly recognized by Congress in specifically defining "employee of the government," also in 28 U. S. C. 2671, to include "members of the military or naval forces of the United States." Further recognition was manifested in the committee reports accompanying several of the earlier tort claim bills which incorporated language similar to that appearing in Section 2671. See H. Rep. 667, 69th Cong., 1st sess., p. 6, on S. 1912; H. Rep. 286, 70th Cong., 1st sess., pp. 6-7, on H. R. 9285; H. Rep. 2800, 71st Cong., 3d sess, pp. 12-13, on H. R. 17168.

These definitions, it was pointed out at hearings on the predecessor bills, were inserted to "make it clear that the act covers all Federal agencies, including corporate instrumentalities, and all Federal officers and employees, *including members of the military and naval forces* and temporary and uncompensated employees" (emphasis added). Hearings before the House Committee on the Judiciary, 77th Cong., 2d sess., on H.R. 5373 and H.R. 6463, p. 7; see *Feres* v. *United States,* 340 U.S. 135, 138. The desire of Congress to employ apt language, in making certain that the Act would be held applicable to torts of military personnel, should not be wrenched "out of its context" so as to escape the Act's establishment of the liability of the United States on the basis of the normal *respondeat superior* relationship. *United States* v. *Campbell,* 172 F. 2d 500 (C.A. 5), certiorari denied, 337 U.S. 957.

c. All prior decisions dealing with this problem under the Tort Claims Act uniformly reject the "broadened liability" contention and hold that the same "scope of employment" doctrine applies to torts of servicemen and of civilian employees. In *United States* v. *Campbell,* 172 F. 2d 500, 503 (C.A. 5), certiorari denied, 337 U.S. 957, the court declared that:

> The attempt then to wrench the phrase set out in quotations in 941(c) [now 28 U.S.C. 2671], "acting within the scope of his office or employment", out of its context in 931(a) [now 28 U.S.C. 1346(b)] and thus to give it a new and entirely different meaning, the greatly expanded one attributed to "in line of duty", when members of the armed forces themselves are claimants, is nothing more than an attempt to put the cart before the horse, to have the tail wag the dog. Such a construction would be to give to the phrase, "within the scope of his office or employment" not one consistent meaning throughout the act, but two inconsistent meanings, one of these applying to acts of all government employees except members of the armed forces, would subject the United States to liability to third persons for acts of its employees only as and to the same extent that a person in private employment would be liable under the law of the state where the accident occurred. The other, applying to acts of military personnel, would subject the Government to fantastic claims of

> liability having no relation to the doctrine of *respondeat superior,* as it is known and applied, in determining the liability of private persons. It would do this, too, in the face of the known purpose of the Tort Claims Act, as shown by its antecedent history, and the record made in its passage, * * *.

Similarly, *United States* v. *Eleazer,* 177 F. 2d 914, 918 (C.A. 4), certiorari denied, 339 U.S. 903, in rejecting the "broadened liability" contention, points out:

> It is argued, however, that, because the Tort Claims Act provides that, in the case of a member of the military or naval forces, "acting within the scope of his office or employment" means "acting in line of duty", the responsibility of the United States under the respondeat superior doctrine is greatly enlarged, since the phrase as used in prior legislation is construed to cover conduct without as well as within the scope of eployment as ordinarily understood. We are not impressed with this argument. It was the manifest purpose of Congress, plainly set forth in the words of the statute, to render the United States liable for the torts of its employees with certain specified exceptions, just as though it were a private person; and there could have been no possible reason to extend the rule of respondeat superior in the case of torts committed by military or naval personnel. The words of the

> statute relied on by plaintiff were doubtless used because it was felt that as to military and naval personnel "line of duty" more correctly described action representing the government than "scope of employment"; but it is clear, we think, that neither phrase as used in the act was intended to do more than provide for liability on the part of the government for acts committed by those carrying on its business under such circumstances as to render it liable therefor if it were a private person. * * *

Accord: *Rutherford* v. *United States,* 73 F. Supp. 867 (E.D. Tenn.), affirmed *per curiam,* 168 F. 2d 70 (C.A. 6); *Leonard* v. *United States,* 131 F. Supp. 694, 700 (D. Wyo.); *Baker* v. *United States,* 127 F. Supp. 644 (D.D.C.); *O'Connell* v. *United States,* 110 F. Supp. 612 (E.D. Wash.); *Stekovich* v. *United States,* 102 F. Supp. 925 (M.D. Pa.); *Greenwood* v. *United States,* 97 F. Supp. 996 (W.D. Ky.); *Cropper* v. *United States,* 81 F. Supp. 81 (N.D. Fla.); see also *Moye* v. *United States,* 218 F. 2d 81 (C.A. 5); *United States* v. *Lushbough,* 200 F. 2d 717 (C.A. 8); *Fries* v. *United States,* 170 F. 2d 726 (C.A. 6), certiorari denied, 336 U.S. 954; *Sanchez* v. *United States,* 177 F. 2d 452 (C.A. 10); *McConville* v. *United States,* 197 F. 2d 680 (C.A. 2), certiorari denied, 344 U.S. 877; *Long* v. *United States,* 78 F. Supp. 35 (S.D. Cal.). The Supreme Court of Canada, in interpreting a statute similar to the Federal Tort Claims Act, has also employed the normal *respondeat superior* test in determining

liability of the Crown to third persons for the torts of military personnel. *King* v. *Anthony,* Canada Law Reports (S.C. 1946) 569.

2. Nor, contrary to the assertions in petitioner's brief, do we believe that the opinion below has totally disregarded the normal *respondeat superior* test in favor of "a narrower liability in the case of members of the armed forces" (p. 22). That the opinion below actually applied the conventional standard seems to us to be made clear by the court's repeated emphasis that Seabourn was out on a wild frolic "having no conceivable connection with the performance of any known military duty" and that he was not then "on military business of any kind" (R. 180, 181). Furtherance and performance of the employer's business is, as we will show (*infra,* pp. 26, ff.), the touchstone of *respondeat superior* liability. Since, as the opinion below notes, "a private employer could [not] be held liable in damages for the tortious act of an employee occurring on an allowed 'day off' while he is out driving on a joy ride while drunk," neither may *respondeat superior* liability be imposed on the United States for such an act (R. 179). See also R. 180, referring to the California cases on "scope of employment". Other portions of the opinion confirm the view that the court below *did* measure governmental liability for Cpl. Seabourn's tort under the conventional *respondeat superior* test. The opinion quotes with approval the language from *United States* v. *Eleazer,* 177 F. 2d 914, 918 (C.A. 4), certiorari denied, 336 U.S. 903, to the

effect that "the 'line of duty' language was used to 'more correctly' describe the conduct of military personnel in acting for the Government" (R. 181), and also the statement from *United States* v. *Campbell,* 172 F. 2d 500, 503 (C.A. 5), certiorari denied, 337 U.S. 957, that "Congress was undertaking with the greatest precision to measure and limit the liability of the Government under the doctrine of *respondeat superior*" (R. 181). Obviously, the opinion below would not have relied on the *Eleazer* and *Campbell* cases if the court had intended, as petitioner now argues, completely to abandon the *respondeat superior* test for the tort involved here.[7]

As we pointed out in our brief in opposition (pp. 9-10), there is language in the Ninth Circuit's opinion which can be read as going further—as imposing an *additional,* narrowing, requirement that servicemen must not only be acting within the

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[7] Judge Bone, who authored the opinion below, recognized that the *respondeat superior* doctrine applies to both torts of military and civilian personnel in his earlier, dissenting opinion in *Murphey* v. *United States,* 179 F. 2d 743, 746-747 (C.A. 9):

> The Fifth Circuit has held that, as used in the Act, "line of duty" is equivalent to "scope of employment" and is to be determined by the doctrine of respondeat superior in the same manner and to the same extent as the liability of private persons under the doctrine is measured in the various states. United States v. Campbell, 5 Cir., 172 F.2d 500, certiorari denied 337 U.S. 957, 69 S. Ct. 1532. See also Hubsch v. United States, 5 Cir., 174 F. 2d 7. I think that these two cases correctly state the proper rule of law, are in point, and (under California law) should control our decision in this case.

scope of employment under normal *respondeat superior* principles, but also that they be serving in line of "military" duty. See R. 179. This portion of the opinion is unclear. By its insistence that "line of duty" means line of *military* duty, the court may possibly have been trying to make certain that liability for military torts would be based not on the broadened "line of duty" concept employed in veterans' and servicemen's benefit legislation but on the ordinary doctrine of *respondeat superior,* so that the Government would be liable only when the soldier was furthering his military or official or "business" duties. With such a construction we, of course, agree. But if the court was laying down, by way of alternative holding, that "scope of employment" is generally narrower for military personnel than for civilians, we part company. Our position is, as stated above (*supra,* pp. 14-23) that the general standard is the same for all "employees" of the Government, civilian or military. However, this difference with one part of the opinion below does not affect, in any way, our support of the result, for the court made it crystal clear that it also (and primarily) tested Seabourn's conduct by normal employer-employee rules (*supra,* pp. 23-24).

II

Cpl. Seabourn Was Not Acting Within the Scope of His Employment When, While on Pass, He Obtained Unthorized Possession of the Military Vehicle and Went Joy Riding in It.

A. *Respondeat Superior Liability Is Imposed Only Where the Servant Is Engaged in His Master's Business and Is Subject to His Control at the Time of the Accident*

It is familiar law that the "true test" for application of the *respondeat superior* doctrine, in common law damage actions, is whether the servant, at the time of the accident, was "conducting the master's affairs * * *. The master's responsibility cannot be extended beyond the limits of the master's work." *The Standard Oil Co.* v. *Anderson,* 212 U.S. 215, 221; *Farwell* v. *Boston and Worcester Railroad Corporation,* 4 Metcalf 49, 55-56. The "ground of liability of the master for the negligent act of the servant is that the servant is conducting the master's affairs." *United States* v. *Eleazer,* 177 F. 2d 914, 916 (C.A. 4), certiorari denied, 339 U.S. 903. The "dominant purpose," as stated by Cardozo, J., "must be proved to be the performance of the master's business." *Fiocco* v. *Carver,* 234 N.Y. 219, 223. Obviously, if the employee is not prosecuting or furthering his employer's business, "his acts cannot, upon the doctrine of *respondeat superior,* be imputed to the employer. * * * No jurisprudence with which we are familiar holds to the contrary or states the principle differently."

Johnson v. *Esso Standard Oil Co.*, 211 F. 2d 397, 399, 400 (C.A. 5).

There is a second essential element of the employer's "vicarious liability in tort" under the *respondeat superior* theory, *i.e.*, the employer must have the right and power to direct and control the employee in the performance of the negligent act or omission which caused the injury. *Board* v. *Hearst Publications*, 322 U.S. 111, 120-121, 128; *Standard Oil Co.* v. *Anderson*, 212 U.S. 215, 221; *United States* v. *Eleazer*, 177 F. 2d 914, 916-7 (C.A. 4), certiorari denied, 339 U.S. 903; *Craige* v. *Austin Powder Co.*, 91 F. 2d 664 (C.A. 4); *P. F. Collier & Son Co. v. Hartfeil*, 72 F. 2d 625 (C.A. 8); *Phelps* v. *Boone*, 67 F. 2d 574 (C.A. D.C.), certiorari denied, 291 U.S. 677; *Standard Oil Co.* v. *Parkinson*, 152 Fed. 681, 682 (C.A. 8); *Brady* v. *Chicago and G. W. Ry. Co.*, 114 Fed. 100 (C.A. 8); see also *Conversions and Surveys* v. *Roach*, 204 F. 2d 499, 501 (C.A. 1); *Restatement, Agency*, § 228, comment c; § 229, comment c.

The absence of either one of these two conditions —the furtherance of the employer's business or the right of control—prevents the imposition of *respondeat superior* liability on the employer. In the instant case, neither of these two conditions exists.

1. *Cpl. Seabourn Was Not on Government Business at the Time of the Accident.* Seabourn's regular duty was that of supply clerk (R. 13). On the day of the accident, March 3, 1949, he was on pass, "did not work at all," and "just took off" (R. 14,

24). His taking and use of the Government vehicle was not even remotely connected with his duties as a supply clerk or with any other "official duties" (R. 17, 26). Instead, he took possession of and used the vehicle to indulge in joy riding and in drinking. As emphasized by the courts below, when "[r]educed to their simplest terms, the facts of this case show beyond any doubt that Seabourn was out on a wild frolic when he injured" petitioner and "was not * * * on military business of any kind" (R. 180, 47).

This case is on all fours with *King* v. *United States,* 178 F. 2d 320 (C.A. 5), certiorari denied, 339 U.S. 964, where an Army flier, without authority of his superiors, obtained, flew, and later crashed an Army Air Force plane causing damage to plaintiff. In affirming summary judgment for the United States, the court, in language which seems to fit the instant case as if written for it, emphasized that the employee "was not acting in line of duty when he left the army post, got drunk, returned, and took off as he did with a plane, which crashed into appellant's house. In so doing, [he] was on a frolic of his own, and was not in any manner serving the interests of the United States" (178 F. 2d at 322).

2. *The Government Had No Right to Control Seabourn in the Performance of the Negligent Act Which Caused the Injury.* It cannot be challenged that Seabourn, at the time of the accident, was on pass and free of any military duty (R. 17, 26, 51, 170, 179). His relationship to the Government while on this pass or off-duty status "was not analo-

gous to that of a soldier * * * performing duties under orders." *Feres* v. *United States,* 340 U.S. 135, 146. A soldier who is off duty or on pass is not engaged in the business of the United States. This Court early stated that, while on pass or leave, a serviceman "is at liberty to go where he will during the permitted absence, to employ his time as he pleases, and to surrender his leave if he chooses." *United States* v. *Williamson,* 23 Wall. 411, 415. The leave is a favor extended "for his sole accommodation" to permit him to "enjoy a respite from military duty." *Foster* v. *United States,* 43 C. Cls. 170, 175; see *Hunt* v. *United States,* 38 C. Cls. 704, 710.

The vital distinction between being on a pass or off-duty status and acting subject to military orders has been noted in cases under the Tort Act. *E.g., Brooks* v. *United States,* 337 U.S. 49; *Feres* v. *United States,* 340 U.S. 135. When a soldier is off duty, he is "on his own" and his specific conduct is normally "subject to the control of no one but himself." *United States* v. *Sharpe,* 189 F. 2d 239, 241 (C.A. 4); *United States* v. *Eleazer,* 177 F. 2d 914, 916 (C.A. 4), certiorari denied, 339 U.S. 903; *Sanchez* v. *United States,* 177 F. 2d 452, 453 (C.A. 10); *Rutherford* v. *United States,* 73 F. Supp. 867, 868-869 (E.D. Tenn.), affirmed, 168 F. 2d 70 (C.A. 6). Application of *respondeat superior* should no more suffice to make the Government responsible for the negligence of a soldier who is absent from his post of duty on a pass than it would suffice to impose liability for the acts of a soldier while absent without leave. *United States* v. *Sharpe,* 189 F. 2d at

240, 241 (C.A. 4). Petitioner recites (Pet. Br. 37-38) the general restraints on servicemen while off-the-post on pass or furlough, but these broad rules of conduct—comparable in many respects to restrictions imposed by some federal agencies on their civilian employees—obviously do not constitute the type of specific "control" over the particular conduct resulting in the injury which the principle of *respondeat superior* implies. If a service's general control over its men at all times were sufficient, the United States would be automatically liable for all torts committed at any time or place by servicemen, and "line of duty" would be broadened, for the Tort Claims Act, far beyond the expanded concept used even in benefit legislation.

3. *The "Recreational Activity" Label, Placed by Petitioner on Seabourn's Unauthorized Use of the Military Vehicle for Drinking and Joy Riding, Does Not Bring It within the Scope of His Employment.*

The armed services, as petitioner asserts, are, of course—like many other employers—"directly concerned with the morale and recreation" of servicemen. A sound recreational program improves employees' morale and efficiency, enables them to maintain work at a high level, and thus indirectly benefits the employer's business.[8] And we recognize

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[8] The decided cases, however, take the view that the benefits inuring to the employer through improved employee morale are too indirect and intangible to justify imposition of *respondeat superior* liability. Thus, the courts have noted that

that there may be even greater need for employer-organized and employer-supervised recreational activities where employees are based on an island, like Guam, thousands of miles removed from the homeland.

The pertinent Army Regulations, No. 700-105 (*infra*, pp. 50-51), do allow the use of Army vehicles, whenever possible, for "authorized, organized, and supervised recreational" activities. When the vehicles are so used, the driver assigned to drive the vehicle acts within the scope of his employment because he has been authorized to drive it and because employer-controlled and employer-supervised recreation may be viewed as furthering the employer's business. In our view, *Murphey* v. *United States*, 179 F. 2d 743 (C.A. 9), which is so

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increased employee morale and loyalty does not warrant the conclusion that "the servant taking advantage of this permission [to use the employer's car] is in a legal sense promoting or facilitating the master's business." *Adams* v. *Quality Service Laundry & Dry Cleaners*, 253 Wis. 334, 337; *Gewanski* v. *Ellsworth*, 166 Wis. 250, 253. See also *Rogers* v. *A.-C. Mfg. Co.*, 153 Ohio St. 513 (employer not liable for tort of employee playing on employer's team in industrial golf league); *Toms* v. *Delta Savings & Loan Ass'n*, 162 Ohio St. 513 (employer not liable for tort of baseball player where employer furnished team with uniforms and equipment); *Stenzler* v. *Standard Gas Light Co. of N. Y. City*, 179 App. Div. 774, affirmed, 226 N. Y. 681 (employer not liable for injuries resulting from collision with its truck which was lent to employees for use on a picnic); *Harrington* v. *Border City Manuf. Co.*, 240 Mass. 170 (employer not liable for injuries resulting from baseball game played by employees during lunch hour on employer's premises); *Beatty, Appellant* v. *Firestone T. & R. Co.*, 263 Pa. St. 271; *Reilly* v. *Connable*, 214 N.Y. 586; *Stenger* v. *Mitchell*, 70 Ga. App. 563; *Loucks* v. *R. J. Reynolds Tobacco Co.*, 188 Minn. 182.

heavily relied upon by petitioner, holds nothing more than that the driver of an Army truck, acting pursuant to orders in carrying an organized group of soldiers into town for a specified recreational activity, is within the scope of his employment even though the accident happened about two or three blocks off his prescribed route. See the discussion of the *Murphey* case in the opinion below, R. 174-5. The same principle applies to the administrative decisions cited at Pet. Br. 35.

In the instant case, it is plain that Seabourn was not using the vehicle to transport military personnel in connection with an organized and authorized activity. Instead, his taking and use of the vehicle was "unauthorized," "without the knowledge or approval" of his superior officers, and in contravention of applicable Army Regulations (R. 47, 180). When the accident happened, Seabourn, whose entire trip was unauthorized, had not merely deviated from a prescribed, official route, as had the soldier in the *Murphey* case. Seabourn's "wild, reckless and wholly independent act of violence" while joy riding and drunk was, as the court below observed, "a far cry" from any recreational activity authorized in the Army Regulations (R. 180). Moreover, the theory that a recreational activity subjects an employer to a *respondeat superior* liability is the assumption, noted above, that the activity will improve the employee's efficiency and increase his work output, with the resulting benefit to the employer.[9] Obviously, Seabourn's

[9] Cf. cases cited *supra*, fn. 8, pp. 30-31.

conduct, far from being calculated to improve his efficiency, was much more likely to result in a serious accident with disabling injuries which would impair, if not completely destroy, his work efficiency. *Supra,* pp. 27-28.

Throughout her brief (e.g., Pet. Br. 7, 29, 40-41, 42-43, 45), petitioner (i) assumes that the record requires a finding of a custom or practice in Seabourn's unit to use military vehicles, issued to others for official use, for individual recreational purposes, and (ii) urges that this "custom" or "practice", although in plain contravention of the regulations, is enough to demonstrate that Seabourn was acting within the scope of his employment. The state of the record on this point should first be made clear. As our Statement, *supra,* pp. 3-5, shows, there is slight evidence of such a custom; both courts below assumed that it might exist but, apparently because of the meagerness of the evidence, neither accepted petitioner's proposed factual finding that Seabourn's use of the vehicle "was in accordance" with such an "established custom." (R. 45, 49, 55, 180). In addition, both courts found that no responsible official authorized Seabourn's use of the vehicle (R. 47, 172, 180), and the Court of Appeals indicated that, if the claimed practice existed, no proper officer countenanced or knew about it (R. 180). Both courts also agreed that the custom, if there was one, was in violation of the applicable military regulation.

For the purposes of this case in this Court, we may assume that in Seabourn's particular unit mil-

itary vehicles were passed on from one serviceman to another and surreptitiously used, despite the trip ticket, for off-the-post individual recreation. But that casual and illegal practice cannot transform Seabourn's drunken frolic into a recreational activity within the scope of his employment. In the first place, as we have just pointed out (*supra,* pp. 32-33), "recreation" of this character can hardly be termed an aid to the maintenance or improvement of the efficiency of the troops. Secondly, the pertinent Army regulation forbade any practice of passing vehicles around and using them as Seabourn did here (*infra,* pp. 50-51), and his driving was therefore clearly unauthorized. In *McConville* v. *United States,* 197 F. 2d 680, 683, 684 (C.A. 2), certiorari denied, 344 U.S. 877, the Second Circuit laid it down as a requirement, in military vehicle Tort Claims Act cases, that there be proper authorization to use the car for a purpose within the pertinent regulations.[10] That limitation is an appropriate and necessary one, for the regulations and directives generally mark the boundaries of the area of military, as distinguished from purely personal, activity.

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[10] As our unsuccessful petition for certiorari in *McConville* indicates (No. 369, Oct. Term, 1952), we do not agree with the Second Circuit's holding that the United States is liable for injuries caused by the driving of a serviceman, bent on his own frolic, who has procured the vehicle and the permission of his superiors by fraudulently representing that his mission is proper official business. But of course we agree that, at the very least, the authorization should formally be for a proper purpose, allowable under the regulations.

We do not mean to argue that no serviceman whose activity is in violation of a regulation can ever be held to be acting within the scope of his employment. Perhaps if the whole action is plainly for the benefit of the service, an incidental violation in means or method can be ignored; the rulings of The Judge Advocate General discussed by petitioner at pp. 44-45, 48 of her brief fall within that class. But certainly where, as here, the regulations reveal that a particular activity is definitely not beneficial to the service and is not to be undertaken, a court would not be justified in holding the serviceman to be within his employment while carrying on that precise activity simply because there had grown up in his company a practice of violating and ignoring the regulation for personal ends.

B. *Federal Law Governs the Issue of "Scope of Employment" but the Facts Here Prevent Such a Finding Irrespective of Whether State or Federal Law Applies.*

1. To determine whether a Government employee, military or civilian, is acting within the scope of his employment for the purpose of the Tort Claims Act, we must look to federal law and decisions (R. 45). In passing on this precise question, the Court of Appeals for the Fourth Circuit has stated:

> We look to the federal law and decisions to determine whether or not the person who inflicted the injury was an "employee of the Government * * * acting within the scope of his

> office or employment." * * * The Tort Claims Act adopts the local law for the purpose of defining tort liability, not for the purpose of determining the relationship of the government to its employees. [*United States* v. *Sharpe,* 189 F. 2d 239, 241.]

The employment relationship between the Government and its employees "is distinctively federal in character" and is "governed exclusively by federal law." *Feres* v. *United States,* 340 U. S. at 143 ,146. Since "the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources," they must be "governed by federal authority." *United States* v. *Standard Oil Co.,* 332 U. S. 301, 305-306; *United States* v. *Gilman,* 347 U. S. 507, 511. It "would hardly be a rational plan" to subject the employment relationship between the Government and its employees to the force of 48 sets of dissimilar and frequently irreconcilable statutes and decisions. *Feres* v. *United States,* 340 U. S. 135, 143. Such a result, notwithstanding petitioner's assertions, should not be lightly attributed to Congress.

The opinion of the court below recognizes the need for resort to federal law where the tort, as here, was committed by military personnel, but would apparently select local law with respect to torts of civilian personnel. For the reasons already outlined, it is our view that federal law must determine the relationship between the Government and all of its employees, civilian and military.

2. In any event, the choice-of-law question presents no problem in this case. Regardless of

whether resort be had to federal authority or to state court decisions, it is fundamental that an employee's negligence will not be imputed to his master if the negligence occurs when the servant has obtained unauthorized possession of the master's vehicle and takes it out for drinking and joy riding while on a wild frolic. All federal and state authorities recognize that the touchstone for *respondeat superior* liability is the servant's conduct in furtherance of his master's business at the time of the accident and that the master is therefore not responsible for the accident of a servant on a frolic of his own. See *Johnson* v. *Esso Standard Oil Co.*, 211 F. 2d 397, 398-9 (C. A. 5); *Standard Oil* v. *Anderson*, 212 U. S. 215, 221.

California [11] follows the same rule. See *Kish* v. *California State Automobile Assn.*, 190 Cal. 246, 248 (no *respondeat superior* liability because employee not in performance of any act connected with the business of his employer when he had finished his work for the day and while off duty was on his way downtown for supper); *Lee* v. *Nathan*, 67 Cal. App. 111 (no *respondeat superior* liability where employee was driving the employer's vehicle after duty hours while pursuing his own ends even though injuries could not have been committed without the facilities so afforded to the employee by the employer); *Slater* v. *Friedman*, 62 Cal. App. 668, 672 (holding that where the servant's "act is done while the servant is at liberty from service and pursuing his own ends exclusively,

[11] Guam has adopted, as stated in the opinion below, "the rule of *respondeat superior* in force in California. It is thus 'the law of the place', i.e. Guam" (R. 170). See also *United States* v. *Johnson*, 181 F. 2d 577, 580-581 (C.A. 9).

there can be no question of the master's freedom from all responsibility, even though the injury complained of could not have been committed without the facilities afforded to the servant by his relation to the master"). And the Court of Appeals below stated emphatically that the California decisions would not support an award to petitioner (R. 180).

C. *The United States Would Not Be Liable for Cpl. Seabourn's Tort Even If There Were Applied the Broad "Line of Duty" Test, the Workmen's Compensation Test, or the "Service of the Ship" Test.*

Up to this point we have shown (1) that Congress intended a uniform *respondeat superior* test for determining whether there should be governmental liability under the Act for torts of military personnel and other federal employees; (2) that the broad construction accorded the phrase "line of duty" in other legislation has no place within the framework of the Tort Claims Act; and (3) that under the facts as found by both courts below the United States cannot be held liable under *respondeat superior* in this case. We will now point out that even application of the broad "line of duty" test would not, because of the facts found, result in liability on the part of the United States. The same considerations will establish that petitioner's reliance on cases drawn from the workmen's compensation field and the "service of the ship" concept is completely misplaced, even if the general standards announced in those bodies of law be accepted.

1. *The Broad "Line of Duty" Test.* Under this test, as defined by Congress for veterans' pension and other administrative benefit purposes, a serviceman may not be deemed to be in "line of duty" when his injuries are "the result of his own willful misconduct." Act of September 27, 1944, 58 Stat. 752. The pertinent Army Regulations implementing this statutory definition provide that "negligence so gross as to evidence a reckless or wanton disregard of the consequences thereof should be regarded as willful" misconduct. A. R. 600-140, par. 2. The same regulations provide, in addition, that an injury resulting from the "intemperate use of intoxicating liquor" shall also be considered as having resulted from the type of misconduct which bars a "line of duty" finding. A. R. 600-140, par. 2.

The facts in the record establish that Seabourn's misconduct at the time of the accident would preclude a "line of duty" finding under both quoted provisions of the Army Regulations. The two lower courts found that he had obtained unauthorized possession of the Army vehicle, got drunk, and while on a joy ride injured petitioner. As noted by the court below, "there was overwhelming evidence that Seabourn was drunk" (R. 168). Seabourn himself acknowledged that he was intoxicated (R. 25). And his "irresponsible" joy riding "late at night" led to his "wild, reckless and wholly independent act of violence" against petitioner.[12]

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[12] Seabourn's joy ride and reckless conduct was plainly "criminal," as observed by the court below (R. 180). See the

Seabourn's drunkenness, standing by itself, shows that even under the broad military standard of "line of duty," Seabourn was not in "line of duty." Furthermore, his irresponsible driving falls well within the established meaning of the misconduct described in the other quoted provision of the Army Regulations, *i. e.,* gross negligence manifesting a "reckless or wanton disregard of the consequences." A. R. 600-140, par. 2. Obviously, his conduct created an unreasonable risk and a high degree of probability of bodily harm. See *Restatement Torts,* Section 500, Comment (g), and Section 502, Comment.

2. *The "Workmen's Compensation" Test.* Perhaps the closest analogy to the broad "line of duty" definition used in determining whether service-incurred injuries are compensable for pension and disability benefit purposes is the requirement in workmen's compensation law that a work injury, to be compensable, must be one arising out of and in the course of employment. This test, like the "line of duty" standard, has been very liberally interpreted so as to further the desirable purpose of making provision for employees and their dependents whenever the employees' earning capacity has been impaired or destroyed by an injury while at work or incident to it.

Manual for Courts-Martial, U. S. Army (1949), p. 330, par. 159, which sets forth the specification form for the offense of "joy riding"; see also Manual for Courts-Martial, United States (1951), p. 362; *United States* v. *Phillips,* Court-Martial Reports, JAG, Air Force, vol. 1, pp. 1, 4; *United States* v. *Griffith,* 3 id., pp. 235, 240; *United States* v. *Ashford,* Court-Martial Reports, JAG, Armed Forces, vol. 3, pp. 201, 204; *United States* v. *McMains,* 9 *id.,* pp. 338, 341.

For those reasons, the "arising out of and in the course of employment" test is not confined by common law conceptions of scope of employment. *Cardillo* v. *Liberty Mutual Ins. Co.*, 330 U. S. 469, 481; *Matter of Waters* v. *Taylor Co.*, 218 N. Y. 248, 251. It is, therefore, not "necessary [for workmen's compensation benefit purposes] that the employee be engaged at the time of the injury in activity of benefit to his employer." *O'Leary* v. *Brown-Pacific-Maxon*, 340 U. S. 504, 507.

As we have already pointed out (*supra*, pp. 12-14, 16-17), those same reasons show that the liberal interpretation of the "arising out of and in the course of employment" test in the administration of compensation laws has no application in determining whether an employee's conduct exposes the employer to a vicarious liability to a third person for his tort under the *respondeat superior* principle. But it is appropriate to note that, as in the "line of duty" situation, Seabourn's intoxication would have barred a "course of employment" finding even under the liberal workmen's compensation benefit test. By specific statutory provision, 36 states provide that an employee's intoxication will bar an award of workmen's compensation benefits. Larson's *Workmen's Compensation Law* (1952), vol. 1, p. 490; Schneider, *Workmen's Compensation Text* (1948), vol. 6, pp. 342-351, 492. In the remaining jurisdictions, intoxication has been held to bar benefits on the ground that the claimant was guilty of misconduct or had abandoned his employment by making himself incapable of discharging the duties of that employment. See

Emery Motor Livery Co. v. *Indus. Com.*, 291 Ill. 532, 534; *O'Neil* v. *Fred Evens Motor Co.*, 160 S. W. 2d 775, 779 (Mo. App.); *Roebling's Sons Co.* v. *Industrial A. Com.*, 36 Cal. App. 10, 13, 14.

3. *The "Service of the Ship" Test.* Similar considerations show the inapplicability of the "service of the ship" cases (Pet. Br., p. 33). These seamen cases simply hold that the shipowner's liability to the seaman for maintenance and cure is not cut off where the seaman, during the term of a shipping engagement, is injured while on shore leave. *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724; *Warren* v. *United States*, 340 U. S. 523. The cases underscore the traditional view that the seaman is "a member of a favored class. He is a ward of the admiralty." *Warner* v. *Goltra*, 293 U. S. 155, 162. Indeed, this Court has noted that the shipowner's obligation to the seaman under the "service of the ship" concept is even broader than the "course of employment" test in workmen's compensation statutes (*Aguilar* v. *Standard Oil Co.*, 318 U. S. 732; *Norton* v. *Warner Co.*, 321 U. S. 565, 570), and it is possible for a seaman to be in the "service of the ship" even though he "has at the time no duty to perform for the ship" or while he is on shore leave. *Warren* v. *United States*, 340 U. S. 523, 529-530.

Accordingly, that test, like the broad "line of duty" standard for military benefits and the liberal workmen's compensation rule of "course of employment," has no relevance here. However, even with respect to the seaman's right to maintenance

and cure under the "service of the ship" test, willful misconduct or reckless disregard by a seaman for his own safety will bar a recovery. *Warren* v. *United States,* 340 U. S. 523, 528; *The Ben Flint,* 3 Fed. Cas. No. 1299 (D. Wis.). As the record makes clear, Seabourn's joy ride while drunk was an irresponsible act in reckless disregard of his own safety as well as that of others. A seaman in Seabourn's situation would have forfeited his rights under even the "service of ship" test.

III

Federal Liability Under the Tort Claims Act May Not Be Predicated on Government Ownership of the Vehicle Driven by Seabourn.

For the reasons set forth in Points I and II, we believe that the only type of liability cognizable under the Tort Claims Act is a *respondeat superior* liability and that under the facts found by both courts below there can be no such liability here for Seabourn's tort.

Petitioner's brief urges, however, that there is another "avenue of governmental liability" (Pet. Br. 51). The argument seems to be that the vehicle involved was a government-owned vehicle and that there was, in addition, negligence in entrusting it to Seabourn. But government ownership of the vehicle cannot, by itself, justify liability under the Act for its negligent operation. Nor does the record in any way show negligence on the part of any other military personnel in connection with Seabourn's assumption of unauthorized possession of the vehicle.

A. *Government Ownership of a Vehicle Does Not Subject the Government to Liability*

It is true that in at least eleven jurisdictions—including California, whose law is generally followed in Guam,[13] where the instant case arose—the owner of a vehicle may be held liable for its negligent operation even though the vehicle was not, at the time of the accident, used in the owner's business.[14] In these jurisdictions, liability is placed on the owner as an incident and responsibility of ownership, without regard to scope of employment or *respondeat superior* principles. Indeed, the chief purpose of such a liability is to hold the owner responsible for damages "where the principle of *respondeat superior* is inapplicable." *Burgess* v. *Cahill,* 26 Cal. 2d 320, 323; *Casey* v. *Fortune,* 78 Cal. App. 2d 922, 925-926.[15] But, as we have shown

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[13] *United States* v. *Johnson,* 181 F. 2d 577, 580-581 (C.A. 9); see fn. 11, *supra,* p. 37.

[14] Ten states have achieved that result through the so-called "imputed liability" or "permissive use" statute. Deering's Calif. Code, Veh. Code Ann. § 402 (1948); D.C. Code § 40-403 (1940); Idaho Code Ann. § 49-1004 (1948); Iowa Code Ann. § 321.493 (1949); Mich. Stat. Ann. § 9.2101 (Supp. 1949); Minn. Stat. Ann. § 170.54 (1946); N. Y. Veh. & Traffic Law § 59 (Supp. 1951); R. I. Gen. Laws 1938, c. 98, § 10 (1938), as amended by Pub. Laws 1940, c. 867, § 1; Wis. Stat. § 85.01 (1a)(c) (1949). Florida has adopted the same rule by decision. *So. Cotton Oil* v. *Anderson,* 80 Fla. 441; *Lynch* v. *Walker,* 159 Fla. 188.

[15] Unlike a cause of action based on conventional *respondeat superior* liability, liability under the California "imputed liability" or "permissive use" statute is limited to $5,000 for the death of or injury to one person. Deering's Calif. Code, Veh. Code Ann. § 402(b) (1948); *Snodgrass* v. *Hand,* 220 Cal. 446, 447.

(*supra,* pp. 12-14), the basic precondition of federal liability under the Tort Claims Act is the requirement of 28 U.S.C. 1346(b) that the tort of the government employee be committed *while he was acting within the scope of his office or employment.* Since the California type of statute creates a cause of action against the owner of a vehicle for the negligence of its driver, irrespective of whether the driver was acting within the scope of his employment or was even in the owner's employ, it is clear that such liability may not be fastened on the United States in the face of the contrary requirement of the Tort Claims Act.

Recognizing the foregoing considerations, all of the cases involving this problem are in agreement that, notwithstanding state law, federal ownership of the vehicle causing the accident is insufficient to impose liability on the United States under the Federal Tort Claims Act. Thus, the Fifth Circuit in *In re Texas City Disaster Litigation,* 197 F. 2d 771, 776, pointed out that "liability because of the ownership of property is not included in the Act." This Court, in affirming that decision *sub nom. Dalehite* v. *United States,* 346 U.S. 15, 45, expressly stated its concurrence with the view that "liability does not arise by virtue either of United States ownership of an inherently dangerous commodity or property." Similarly, Chief Judge Magruder, foreshadowing the *Dalehite* holding, observed in *United States* v. *Hull,* 195 F. 2d 64, 67 (C.A.1):

> Thus, in certain cases, under local law a private person may be liable without fault for injuries resulting from properly conducted ac-

tivities deemed "ultra-hazardous." Restatement of Torts § 519. But the United States would not be subject to suit on such a liability, for under 28 U.S.C. § 1346(b), the United States has consented to be sued only where the injury was "caused by the negligent or wrongful act or omission" of some employee of the government while acting in the scope of his office or employment.

* * * * *

Or again, under a statute like § 59 of the New York Vehicle and Traffic Law, McK. Consol. Laws, c. 71, a private person owning a motor vehicle may be liable for injuries resulting not only from the negligent operation of the vehicle by a servant while acting within the scope of his employment, but also from the negligent operation of the vehicle "by any person legally using or operating the same with the permission, express or implied, of such owner"; thus the owner may be liable under such a statute for the negligence of an authorized bailee using the car on some business other than that of the owner. Cf. Hubsch v. United States, 5 Cir., 1949, 174 F. 2d 7, 10, certiorari dismissed 1950, 340 U. S. 804, 71 S. Ct. 35, 95 L. Ed. 590. The latter case does not fall within the terms of the Federal Tort Claims Act, since the negligent bailee would not be an employee of the government acting within the scope of his employment.

Accord: *Jackson* v. *United States,* 196 F. 2d 725 (C.A. 3), (adopting the *Hull* opinion); *Fries* v. *United States,* 170 F. 2d 726 (C.A. 6), certiorari denied, 336 U.S. 954; *Hubsch* v. *United States,* 174 F. 2d 7 (C.A. 5), writ of certiorari dismissed, 340 U. S. 804; *Williams* v. *United States,* 189 F. 2d 607 (C.A. 10); *Sanchez* v. *United States,* 177 F. 2d 452 (C.A. 10); *United States* v. *Lushbough,* 200 F. 2d 717 (C.A. 8); *Cropper* v. *United States,* 81 F. Supp. 81 (N.D. Fla.); *Long* v. *United States,* 78 F. Supp. 35 (S.D. Cal.).[16]

B. *There Was No Negligence in Allowing Seabourn to Take Possession of the Vehicle.*

Petitioner's remaining suggestion is that there was negligence on the part of the dispatcher and Lt. Werb in issuing the vehicle to Cpl. Seabourn. The short answer to this argument is that the only issue of negligence drawn into issue by the complaint and the only issue of negligence tried by the district court was the negligence of Seabourn in

[16] There is an additional reason militating against application of the "permissive use" or "imputed liability" theory to the instant case. Under that type of liability it is necessary to establish not only proof of ownership of the car but also permission to drive it. *Krum* v. *Malloy,* 22 Cal. 2d 132; *Du Bois* v. *Owen,* 16 Cal. App. 2d 552, 556. Mere possession of the car by one other than the owner is not sufficient to establish the fact that it was with the owner's permission. *Mucci* v. *Winter,* 103 Cal. App. 2d 627, 631. Here, the trip ticket showed that the vehicle was to be used for official business only. Moreover, Seabourn's superiors had neither the power under the pertinent statutes and regulations nor the intent to authorize the use of the vehicle for an evening of drinking and joy riding. This is confirmed by the concurrent findings below to the effect that Seabourn's use of the vehicle was unauthorized (see *supra,* pp. 3-7, 27-28, 30-35).

operating the vehicle (R. 1-2). Since the complaint did not even attempt to assert negligence on the part of any other military personnel, obviously the United States has had no opportunity to present evidence on the issue—raised for the first time by the petitioner's brief on the merits in this Court. Moreover, if that issue had properly been raised at any time during the trial the Government would have been in a position to introduce competent evidence to disprove negligence of any military personnel other than Seabourn. Thus, the Government would probably have been able to establish, through depositions or other competent evidence, (1) that when Seabourn approached Stiles for the trip ticket, Seabourn "appeared to be sober" to Stiles (R. 155); (2) that Stiles "wouldn't have given him the trip ticket if he was drunk" and (3) that Stiles assumed that the vehicle, which was limited to use on the post, would be used by Seabourn on the post and in connection with "official business only" (R. 148, 155).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

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SEPTEMBER, 1955.

APPENDIX

A. Sections 1346(b), 2674, and 2671 of Title 28 U.S.C. (the reenactment of the Federal Tort Claims Act, 62 Stat. 933, 982, 983), provide in pertinent part:

SECTION 1346. *United States as defendant.*

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

SECTION 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

SECTION 2671. *Definitions.*

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

* * * * *

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.

B. Army Regulations 700-105 (30 June 1948) provide in pertinent part:

26. *Use of vehicles.*— * * *

b. Motor vehicles * * * will be operated * * * only if properly dispatched on WD Form 48 (Drivers' Trip Ticket and Preventive Maintenance Service Record), issued by the dispatching motor pool or under such instructions as the appropriate commander under existing authority may direct.

c. Motor vehicles will be used only for official business, including the special uses listed in paragraph 28.

* * * * *

28. *Special uses.*—Motor vehicles, when available without detriment to other official business * * * may be used by special direction of the commanding officer for the following purposes:

a. Authorized athletics.

b. Transporting personnel, including entertainers and party guests, and supplies and equipment in connection with authorized, organized, and supervised recreational, welfare, and morale-building activities.

* * * * *

29. *Motor pools.*— * * *

d. Vehicles will be dispatched from pools to perform specific tasks, and will not be permanently allocated or assigned to any agency or individual, except as prescribed herein.

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OCTOBER 17, 1955.

Decisions Per Curiam.

No. 24. WILLIAMS *v.* UNITED STATES. Certiorari, 348 U. S. 926, to the United States Court of Appeals for the Ninth Circuit. Argued October 13, 1955. Decided October 17, 1955. *Per Curiam:* This case is controlled by the California doctrine of *respondeat superior*. The judgment is vacated and the case is remanded for consideration in the light of that governing principle. *Henry C. Clausen* argued the cause and filed a brief for petitioner. *Morton Hollander* argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff*, *Assistant Attorney General Burger* and *Paul A. Sweeney*. Reported below: 215 F. 2d 800.